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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,
Petitioners

v.

TERRI LEE HALDERMAN, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

When a state agency and its officials are unable to comply with a federal court order requiring them to fund affirmative relief because the state legislature has expressly deprived them of the power to do so, is that inability a defense to a finding of civil contempt and the imposition of daily $10,000 fines?

TABLE OF PARTIES

The caption of this case in the Court of Appeals for the Third Circuit is as follows:

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman; LARRY TAYLOR, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; KENNY TAYLOR, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; ROBERT SOBETSKY, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky; THERESA SOBETSKY, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky; NANCY BETY BOWMAN, a retarded citizen, by her parents and guardians, Mr. and Mrs. Horace Bowman; LINDA TAUB, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub; GEORGE SOROTOS, a minor, a retarded citizen, by his foster parents, William and Marion Caranfa, all of the above individually and on behalf of all others similarly situated; THE PARENTS AND FAMILY ASSOCIATION OF PENNHURST

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight, DAVID PREUSCH, a minor by his parents and next friends, Calvin and Elizabeth Preusch, and CHARLES DiNOLFI, on behalf of themselves and all others similarly situated,

Plaintiffs-Intervenors

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

v.

PENNHURST STATE SCHOOL & HOSPITAL, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, FRANK S. BEAL, Secretary of the Department of Public Welfare, Stanley Meyers, Deputy Secretary for Mental Retardation, Department of Public Welfare, HELENE WOHLGEMUTH, Former Secretary, Department of Public Welfare, ALDO COLAUTTI, Executive Deputy Secretary, Department of Public Welfare, WILBUR HOBBS, Deputy Secretary for Southeastern Region, Department of Public Welfare, RUSSELL RICE, JR., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare, C. DUANE YOUNGBERG, Superintendent, Pennhurst State School & Hospital, ROBERT SMILOVITZ, Former Superintendent, Pennhurst State School & Hospital, MARGARET GREEN, BETTY UPHOLD, ALICE BARTON, P. E. KLICK, DR. PAROCCA, HELEN FRANCIS, employees and agents of Pennhurst State School & Hospital, JOHN DOCTOR, JAMES NURSE, JANE AIDE, JILL THERAPIST, RICHARD ROE, JANE DOE, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant sued individually and in his or her official capacity, GEORGE METZGER, JOSEPH CATANTA, and ROGER BOWERS, Commissioners for Bucks County, ROBERT STREBL, EARL BAKER, and LEO McDERMOTT, Commissioners for Chester County, FAITH R. WHITTLESEY, CHARLES KEELER, and WILLIAM SPINGLER, Com-

missioners for Delaware County, A. RUSSELL PARKHOUSE, FRANK W. JENKINS and LAWRENCE H. CURRY, Commissioners for Montgomery County, MAYOR FRANK L. RIZZO and THE CITY COUNCIL OF PHILADELPHIA, as Authorities for Philadelphia County, PETER BODENHEIMBER, Mental Health/Mental Retardation Administration for Bucks County, WILLIAM A. McKENDRY, Mental Health/Mental Retardation Administrator for Chester County, P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delaware County, HERMANN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County, and LEON SOFTER, Mental Health/Mental Retardation Administrator for Philadelphia County

Pursuant to Fed. R. Civ. P. 25 (d), successor defendants include: Helen O'Bannon, Secretary of the Department of Public Welfare; Jennifer Howse, Deputy Secretary for Mental Retardation; and George Kopchick, Superintendent, Pennhurst State School & Hospital.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pennhurst State School and Hospital, Department of Public Welfare of the Commonwealth of Pennsylvania, Helen O'Bannon, Secretary of the Department of Public Welfare and the Commonwealth of Pennsylvania hereby petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on February 26, 1982.

I. OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals of which petitioners seek review is reproduced at 46a to 82a and is reported at 673 F.2d 628 (3d Cir. 1982). The opinion and order of the district court is reproduced at 5a to 45a and is reported at 533 F. Supp. 631 (E.D. 1981).

II. JURISDICTION

The judgment of the court of appeals was entered on February 26, 1982. A timely petition for rehearing was denied on March 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. STATEMENT OF THE CASE

A. General History

This matter involves a contempt proceeding arising out of a class action which has already been before this Court. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). That action was commenced in May of 1974 by a minor resident of Pennhurst who challenged the conditions at Pennhurst State School and Hospital ("Pennhurst"), a state operated institution for the mentally retarded. Thereafter, the United States and the Pennsylvania Association for Retarded Citizens intervened as plaintiffs and, in early 1976, plaintiffs amended their complaints to challenge the fact of confinement at Pennhurst.[1] Defendants included Pennhurst, the Commonwealth's Department of Public Welfare and various state officials responsible for the operation of Pennhurst (hereinafter "Commonwealth defendants").

In December of 1977, the district court held that the mentally retarded had a constitutional, federal statutory and state statutory right to receive habilitation and to re-

[1] In so doing, the United States relied only on the United States Constitution. The other plaintiffs raised claims under the federal constitution, state law, the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §6000 *et seq.* ("Development Disabilities Act") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

ceive that habilitation in the least restrictive environment. *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1978). Based on that holding, the district court found that any confinement at Pennhurst was illegal.

Implementing that decision, the district court ordered sweeping injunctive relief, including the closing of Pennhurst, its replacement by "suitable community living arrangements" and the provision of all necessary support services for all of the approximately 1200 persons then residing at Pennhurst. In addition, the district court's order created a "Special Master" who was empowered to supervise the interim operation of Pennhurst and to "plan, organize, direct, supervise and monitor" the transition of residents from Pennhurst into community living arrangements.[2] The court also provided that, "the expenses of the mastership [were] to be borne by the Commonwealth defendants." *Id.*

On appeal, a divided Court of Appeals, found a state law right to receive habilitation and a federal statutory right, under the Developmental Disabilities Act, to receive that habilitation in the least restrictive environment. *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 83 (3d Cir. 1979). The court of appeals rejected most of defendants' challenges to the scope of the relief, including the appointment of a master. The court, however, refused to affirm the district court's order requiring the closing of Pennhurst, providing, instead, for a case by case determination of whether Pennhurst was the least restric-

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[2] On April 1, 1982, the district court amended that order by removing the Master's power to "plan, organise, direct [and] supervise."

tive environment in which habilitation could be provided to any given resident.

On June 9, 1980, this Court granted *certiorari* and, on April 20, 1981, it vacated the Third Circuit's decision. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981). The majority held that the Developmental Disabilities Act did not "require the States to assume the high cost of providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens." *Id.* at 18.

Justice White, joined by Justice Brennan and Marshall, dissented, believing that Section 6010 of the Act was intended to create enforceable obligations against participating states.[8] However, the dissent considered and disagreed with the scope of relief ordered by the lower courts. The dissent specifically eschewed any effort by a federal court to undertake "the task of managing Pennhurst," and made clear that "[a] court-appointed Special Master [was] inconsistent with [its] approach." *Id.* at 54, 55.

On remand, the Third Circuit, per Judge Gibbons, reaffirmed its prior mandate finding a state law right to receive habilitation in the least restrictive environment.[8] *Halderman v. Pennhurst State School and Hospital*, 673 F.2d 647 (3d Cir. 1982). The court again rejected challenges to the scope of relief, including appointment of a master, finding that this Court's failure to reach that issue made its reconsideration on remand unnecessary. Three judges dissented in part, believing that the lower court's

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[8] It based that holding entirely on the same state statute which it had previously found to provide only a right to habilitation.

appointment of a master was improper.[4] A separate petition for a writ of certiorari has been filed by all defendants seeking review of that decision. *Pennhurst State School and Hospital v. Halderman,* October Term, 1981, No. 81-2102.

B. The Contempt Proceedings

Throughout the appellate proceedings in this case, the district court order creating a "Special Master" and requiring the Commonwealth defendants to fund that Master, remained in effect. That order was supplemented by monthly orders directing the "Commonwealth"[5] to pay specified amounts to the Master.

In addition, on April 24, 1980, in compliance with the mandate of the Third Circuit, the district court issued an order appointing a Hearing Master to provide an individual hearing for each Pennhurst resident desiring to live in the community. This Hearing Master was likewise to be funded by the Commonwealth defendants and, as with the Special Master, monthly orders were issued requiring payment of specific amounts by the Commonwealth to that Master.

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[4] Judge Seitz, joined by Judge Hunter, believed that the powers of the Master were overbroad. Judge Garth found the appointment of a Master to carry out the state's state law duties violated principles of federal-state comity and this Court's holdings governing the remedial powers of federal courts.

[5] Those orders were directed to the "Commonwealth", even though the "Commonwealth" is not a party to this action.

In the winter of 1981, Secretary O'Bannon, through the Governor, sought a legislative appropriation of $900,000 to fund the Masters for the fiscal year 1981-82. However, when asked her view by legislators at budget hearings, the Secretary responded, as defendants have in the district court, the court of appeals and this Court: the Masters are improper under the law, unnecessary in fact, and an expensive and burgeoning bureaucracy. She also responded to questions concerning the consequences of a legislative failure to appropriate the requested funds, stating her understanding that the court could not order the legislature to make such an appropriation.

In early June, the legislature passed a budget reducing the requested $900,000 appropriation to $35,000 for the Masters. In addition, the legislation provided that:

> It is the intent of the General Assembly that this appropriation be used for shutdown costs and that no other funds of the Commonwealth be spent for these functions.

On June 25, 1981, counsel for Commonwealth defendants advised the court of the legislature's action and the defendants' inability to pay in excess of the $35,000 appropriated, absent supplemental appropriations. On that same date, Secretary O'Bannon advised the Governor's Secretary of Budget and Administration that the appropriation was insufficient to meet the expected budgets of the Masters. She requested that a supplemental appropriation of $865,000 be sought. Pursuant to that request, the Secretary of Budget and Administration requested from the Legislature a supplemental appropriation of $865,000 to fully fund the Masters. That request was not acted upon by the Legislature.

Through May of 1981, the Commonwealth defendants satisfied each of the orders requiring payments to the Masters. As a result, they paid over $2,000,000 for the Office of the Special Master and over $100,000 to fund the Hearing Master.

On June 4, 1981, the district court had entered orders requiring a payment of an additional $67,746.08 for the operation of the Masters' offices for the month of July 1981. Pursuant to the legislative directive, the Commonwealth defendants paid only $35,000 pursuant to those orders.[6]

Meanwhile, on July 1, 1981, plaintiffs filed a motion seeking to have defendants show cause why they should not be held in civil contempt for failure to obey the orders, requiring payments to the two Masters for their July expenses. On August 25, 1981, after hearing on July 24, 1981, the district court issued its judgment holding Secretary O'Bannon and the Department of Public Welfare were in contempt. Based on that finding, the court imposed on them civil fines totalling $10,000 for each day, after September 2, 1981, that full payment was not made. 533 F. Supp 631 (E.D. Pa. 1981) (25a).

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[6] On July 14, 1981, the court issued orders requiring payment of the masters cost for August. Those orders were appealed by the "'Commonwealth' Defendants Helen O'Bannon, Jennifer House, Russel Rice and George Kopchick." The Court of Appeals dismissed those appeals because the July 14, 1981 orders were directed to the "Commonwealth of Pennsylvania" (a non-party), not those persons named in the notice of appeal. In so doing, it rejected defendants' claim that because she was held in contempt for failing to obey the order, Helen O'Bannon was an aggrieved party for purposes of appeal. Judge Garth, joined by Judge Hunter, dissented. *Halderman v. Pennhurst*, 673 F.2d 645 (3d Cir. 1982).

From September 17, 1981[7] to January 8, 1982, the Commonwealth paid fines totalling $1.2 million.[8] Periodically thereafter, the district court ordered the clerk of the court to transfer money to the Masters from the fund created by the $10,000 payments.[9] On January 8, 1982, the district court issued an order purging the Department of Public Welfare and Secretary O'Bannon of civil contempt and relieving them of the obligation to continue to pay the daily fines. The court did not, however, return any of the fines.[10]

On appeal, on February 26, 1982, the Third Circuit, *en banc* per Judge Gibbons, affirmed. *Halderman v. Penn-*

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[7] On September 3, 1981, Justice Brennan stayed the contempt order pending receipt of responses to defendants' application for a stay. On September 17, 1981, he vacated that stay. Subsequently, defendants' application for a stay was denied by this full Court. Accordingly, on September 17, 1982, the Commonwealth began paying daily fines in the amount of $10,000.

[8] These fines were paid from the appropriation for the general administration of the Department of Public Welfare. While the legislature had expressly limited monies available to fund the Master, there was no legislative prohibition on the use of state funds to pay the fines for civil contempt.

[9] The Commonwealth defendants filed a motion to modify that order to require plaintiffs to post a bond prior to that transfer. That motion was never acted upon by the lower court. Subsequent orders requiring the transfer of funds to the Masters were appealed. Those appeals are still pending. Those appeals challenge only the failure of the district court to protect the contempt fund for return to defendants should they succeed on appeal. That issue, and those appeals, become moot if this Court denies this petition.

[10] To the contrary, its order was based on its finding that the amount of the fines paid into the court as of that date was sufficient to fund the Masters into the foreseeable future.

hurst State School and Hospital, 673 F.2d 628 (3d Cir. 1982) (46a). In so doing, the majority did not address the merits of the case. Instead it held that, on appeal, defendants could raise only those issues which could not otherwise be subject to appellate review. The court then found that defendants could have raised their inability to comply with the district court's payment orders by a Rule 60 motion for relief from the original order, dated March 17, 1978, requiring the Commonwealth to bear the costs of the Special Master. Because a denial of such a motion would have been appealable as of right, the Court held that the effect of the legislative appropriation on defendants' obligations under the district court orders could not be raised as a defense to contempt.

Judge Garth, joined by Judge Hunter, concurred in the finding of appellate jurisdiction, but dissented in the result, believing that the underlying orders creating Masters were improper.[11] and that, therefore, an adjudication of contempt of those orders could not stand. Judge Seitz dissented on the grounds that the Court of Appeals lacked jurisdiction.

Petitioners filed a timely motion for rehearing. That motion was denied on March 23, 1982.

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[11] They had dissented from the decision affirming those orders. *Halderman v. Pennhurst State Hospital*, 673 F.2d 647 (3d Cir. 1982).

IV. REASONS FOR GRANTING THE WRIT

A. Introduction

This case involves an issue of substantial public importance: the power of the federal courts to hold a state agency and its officials in contempt and impose substantial sanctions on them based on their failure to fund an affirmative remedial order when the state legislature has expressly deprived them of the power to do so. The district court's claim to such power in this case raises grave and troubling questions concerning the degree to which the federal judiciary can interfere with or even override a state's appropriation process. In these times of shrinking public fiscs, federal courts should be especially reluctant to interfere with the decisions of elected representatives concerning the expenditure of state funds. *NYSARC v. Carey*, 631 F.2d 162, 165 (2d Cir. 1980).

The Third Circuit, however, avoided this issue by holding that it should have been raised by a motion, under Rule 60 of the Federal Rules of Civil Procedure, seeking to modify the order with which petitioners were unable to comply, rather than as a defense to contempt. Thus, according to the Third Circuit, because defendants failed to satisfy that newly created procedural prerequisite, they were required to violate state law or be held in civil contempt of a federal court order.

In so holding, the Third Circuit misapplied this Court's holding, in *Maggio v. Zeitz*, 333 U.S. 56 (1948),

that impossibility is a proper and complete defense to civil contempt. It also ignored entirely a decision of the Second Circuit allowing the assertion of legislatively created impossibility as a full defense to civil contempt under circumstances substantially identical to those in this case. *NYSARC v. Carey, supra.*

In addition, the Third Circuit's ruling substantially changes the burden of proof in cases such as this, shifting the burden from plaintiffs to demonstrate contempt by clear and convincing evidence to defendants to prove circumstances so changed that *inter alia*, "dangers once substantial have become attenuated to a shadow." *Mayberry v. Maroney*, 558 F.2d 1159, 1163 (3d Cir. 1977), *quoting, United States v. Swift and Co.*, 286 U.S. 106, 119 (1932). Finally the court ignored the history of this case, imposing, *sua sponte*, an unprecedented procedural requirement which is, at best, harsh and meaningless, and, at worst, as in this case, purely punitive. See *Maggio v. Zeitz, supra.*

Accordingly, this Court should review the decision of the Third Circuit and, upon review, reverse that decision.

B. The Decision of the Third Circuit Is in Conflict With the Decisions of This Court in Maggio v. Zeitz, 333 U.S. 56 (1948), and the Second Circuit in NYSARC v. Carey, 631 F.2d 162 (2d Cir. 1980)

In *Maggio v. Zeitz*, 333 U.S. 56 (1948), this Court recognized that the purpose of civil contempt—to coerce compliance—is totally ineffective upon a defendant who lacks the ability to comply. Specifically, this Court held that:

> to jail one for a [civil] contempt for omitting an act he is powerless to perform would . . . make the proceeding purely punitive, to describe it charitably.

Id. at 72. The facts of *Maggio* demonstrate the significance accorded that principle. There, defendant had failed to turn over documents, citing his inability to do so, despite a *res judicata* finding that the documents were within his possession. Notwithstanding that finding, this Court allowed impossibility of performance to be raised as a direct defense to contempt and held that one could not be held in civil contempt for failing to perform an act which he was unable to perform.

In refusing to consider defendants' inability to perform in this case, the Third Circuit attempted to distinguish *Maggio* on two grounds. First, for reasons it failed to explain, the court found it relevant that appellate jurisdiction was based on different statutes in *Maggio* than in this case. More importantly, the court found that *Maggio* dealt with physical impossibility of compliance, while this case involved a law making compliance illegal, but not physically impossible. This conclusion, and, therefore, the distinction which it supports, is simply erroneous.

In this case, defendants have only those powers, as state agencies and officials, granted them by the laws of the Commonwealth of Pennsylvania.[12] Under those laws, defendants *cannot* spend moneys not appropriated by the legislature. *Sloan v. Shapp*, 480 Pa. 449, 463, 391 A.2d 595, 602 (1978), *aff'd*, 440 U.S. 942 (1979); *Burd v. Commonwealth*, 443 A.2d 1197 (Pa. Commonwealth Ct.

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[12] The federal constitution and statutes prohibit state officials from taking certain actions, but provide them no affirmative powers.

1982). It is not a question of illegality, but rather of power. In Pennsylvania, the legislature has total power of appropriation and absent appropriation there is no money for the agencies and officials of the executive branch to spend. *Sloan v. Shapp, supra; Burd v. Commonwealth, supra.*[13]

Thus, the legislature's express limitation on the expenditure of state funds for the Masters created an impossibility for defendants in this case every bit as real as that which this Court considered in *Maggio*. Accordingly, the lower court's contempt order and the judgment of the Third Circuit, affirming that order, are in direct conflict with this Court's holding that civil contempt is inappropriate against parties who are unable to do the acts sought to be coerced.

The Third Circuit's decision also conflicts with a decision of the Second Circuit which recognized both the principle set forth in *Maggio* and its applicability to facts identical, in all relevant respects, to those presented in this case. In *NYSARC v. Carey*, 631 F.2d 162 (2d Cir. 1980), the Second Circuit reversed a district court order holding state officials in contempt for failing to pay state funds to a court-created panel charged with the duty of overseeing implementation of a consent judgment requiring improved conditions at a state-operated institution for the mentally retarded—Willowbrook. In that case, as in this one, the defendant state officials made the required payments for several years until the legislature explicitly denied funding for that purpose. As in this case, defendants defended against charges of contempt on the grounds that they were unable to comply with the court order.

[13] In *Burd*, an intermediate state appellate court recently recognized "as obvious" the proposition that an executive agency cannot spend money without legislative appropriation.

The Second Circuit, considered that defense, agreed that defendants were unable to comply and held that, in light of that inability, contempt was inappropriate.[14] The Third Circuit's holding in this case, that impossibility created by statutory limitations on official action is somehow less significant than "physical" impossibility for purposes of civil contempt, is in direct conflict with the holding of the Second Circuit. This Court should review the ruling in this case in order to resolve that conflict and, in addition, to reaffirm its holding in *Maggio*.

C. The Novel Procedural Rule Established by the Third Circuit Improperly Changes the Relevant Burdens of Proof and, in Addition, Serves No Useful Purpose

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As is noted above, the Third Circuit clearly misapplied this Court's holding in *Maggio v. Zeitz, supra*. Its decision is, therefore, erroneous for that reason alone. However, its decision is erroneous for other reasons as well.

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[14] In so doing, the Second Circuit also rejected the argument that the district court could order state officials to expend state funds for a purpose expressly disallowed by the legislature. *Id.* at 165. Rather, according to that court, "the question of expenditure of state funds [should be left] in the hands of citizens, not in the hands of the federal courts," especially where a more limited remedy—in that case, a negative injunction—is available. *Id.*

Likewise, in this case, a negative injunction—prohibiting continued treatment of retarded persons unless appropriate services are provided—would fully solve any constitutional or statutory violation which might exist. *Halderman v. Pennhurst State Hospital*, Nos. 78-1490, 78-1564, 78-1602, filed February 26, 1982 (3d Cir.), slip op. at 54 (Garth, J. concurring and dissenting). See *Pennhurst State School and Hospital v. Halderman, supra* at 54-55 (White, J. dissenting in part). See also *id.* at 30 n. 23.

First, having distinguished "legal" impossibility from "physical" impossibility, the Third Circuit found that the former could be raised only by a Rule 60 motion to modify the original, not as a defense to contempt of that order. Thus, according to the Third Circuit, in the absence of such a motion, state agencies and officials can be held in contempt and can be required to pay substantial fines (and perhaps be sent to jail) because of their failure to perform acts, which (even the Third Circuit concedes) are illegal, if not impossible, under state law.

Even if precendented, such a result would be unbelievably harsh, placing state officials on the horns of the dilemma of violating state law to avoid liability for federal court contempt simply because of a procedural mistake by their attorneys. In this case, that result is purely punitive, punishing state officials for the failure of their lawyers to predict the creation of this new and unprecedented rule by the Third Circuit.[15]

More importantly, by requiring "legal impossibility" to be raised by Rule 60 motion, the Third Circuit has substantially changed the burden of proof. In a civil contempt proceeding, the burden is on the plaintiff to prove contempt by clear and convincing evidence. *Washington Baltimore Newspaper Guild, Local 35, AFL-CIO-CLC v. Washington Post Co.*, 626 F.2d 1029 (D.C. Cir. 1980); *United States v. Rizzo*, 539 F.2d 458 (5th Cir. 1976). Moreover, impossibility of compliance is an absolute defense to contempt. See *Maggio v. Zeitz, supra.*

[15] In this regard, it should be noted that the Third Circuit developed its procedural ruling *sua sponte*—no party suggested, at any time, that a Rule 60 motion was an appropriate, let alone, the only means to raise the defense of legislatively created impossibility.

On the other hand, in order to avoid contempt by obtaining a modification of the underlying order under Rule 60, a defendant:

> must bear a heavy burden of showing circumstances so changed that 'dangers, once substantial, have become attenuated to a shadow,' United States v. Swift and Co., 286 U.S. 106, 119 (1932), and that absent such relief an 'extreme' and 'unexpected' hardship will result.

Id. Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977); *Ridley v. Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970). Moreover, the grant of such relief is purely discretionary. *United States v. Swift and Co.*, 286 U.S. 106 (1932). Clearly, the burden is substantially increased.

Likewise, the procedure is changed by the Third Circuit's ruling. Certainly an alleged civil contemnor raising a genuine issue of material fact is entitled to a full, impartial hearing. *Washington Metropolitan Area Transit Authority v. Amalgamated Transit Union National Capitol, Local Division 689*, 531 F.2d 617 (D.C. Cir. 1976). At least in the Third Circuit, one seeking to modify an injunction is not necessarily entitled to such a hearing. *Delaware Valley Citizens' Council v. Commonwealth of Pennsylvania*, 674 F.2d 976, 981 (3d Cir. 1982).

The circumstances of the contempt motions at issue herein fully illustrate the inappropriateness of the Third Circuit's ruling.[16] The orders of which petitioners were

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[16] The absurdity of the result is also highlighted by other aspects of the history of this case. On March 2, 1981, the district court issued an order requiring that specific numbers of retarded persons be placed by defendants in community living arrangements. Each of the defendants moved to amend that order on the

found in contempt were issued on June 4, 1981. The appropriations bill which disabled defendants from complying with those orders did not become law until July 1, 1981.[17] On that same day, plaintiffs filed their motion seeking contempt. It is, obviously, difficult to understand when, under the Third Circuit's rule, petitioners could have filed a Rule 60 motion or how such a motion might have advanced resolution of the issues in any way.

Thus, the Third Circuit's ruling, at best, requires state officials to take illegal acts to avoid contempt if they fail to file the proper pre-contempt motion. At worst, in clear violation of this Court's holding in *Maggio*, the Third Circuit would hold defendants in contempt for failure to perform acts which they are truly unable to perform. In either case, the Third Circuit's decision is erroneous and should be reviewed by this Court.

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grounds, *inter alia*, that they would be unable to comply. Without ruling on those motions, the district court later found several of the defendants (but not petitioners herein) to be in contempt of the March 2 order. Certainly, in light of the futility of prior motions, defendants could not have been expected to have predicted the necessity of such motions to assert a defense of impossibility.

[17] It was approved by the legislature on June 22, 1981 and signed by the Governor (who is not a party to this action) on July 1, 1981.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in this case.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-1345

TERRI LEE HALDERMAN et al.,
Plaintiffs

v.

PENNHURST STATE SCHOOL AND HOSPITAL et al.,
Defendants

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,
Plaintiffs-Intervenors

ORDER

AND NOW, this 4th day of June, 1981, upon consideration of cost estimates submitted by the Office of the Special Master, it is hereby ORDERED that the Commonwealth of Pennsylvania shall, on or before the first day of July, 1981, pay to the Registry of this Court the amount of $59,152.74. This amount reflects cost estimates for

operation of the Office of the Special Master from July 1 through July 31, 1981. Pursuant to the Court's Order of July 27, 1978, as amended October 16, 1978, the Clerk of the Court shall not disburse said monies to the Office of the Special Master until he receives an Order from the Court approving the distribution of said funds on the basis of certifications of expenses submitted to the Court by the Office of the Special Master.

(s) R. J. Broderick
Raymond J. Broderick

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-1345

TERRI LEE HALDERMAN et al.,
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v.

PENNHURST STATE SCHOOL AND HOSPITAL et al.,
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UNITED STATES OF AMERICA,
Plaintiff-Intervenor

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,
Plaintiffs-Intervenors

ORDER

AND NOW, this 4th day of June, 1981, upon consideration of cost estimates submitted by the Hearing Master, it is hereby ORDERED that the Commonwealth of Pennsylvania shall, on or before the first day of July, 1981, pay to the Registry of this Court the amount of $8,593.34. This amount reflects cost estimates for operation of the Office of the Hearing Master from July 1, through July 31, 1981. Pursuant to the Court's Order of June 10, 1980, the Clerk of the Court shall not disburse said monies to the Office of the Hearing Master until he receives an

Order from the Court approving the distribution of said funds on the basis of certifications of expenses submitted to the Court by the Office of the Hearing Master.

(s) R. J. Broderick
Raymond J. Broderick, J.

IN THE UNITED STATES DISTRICT COURT
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Plaintiffs-Intervenors

MEMORANDUM

BRODERICK, J., August 25, 1981

On July 24, 1981, this Court held a hearing on a Rule to Show Cause why the Commonwealth defendants should not be held in civil contempt in connection with the Commonwealth's failure to comply with this Court's Order of June 4, 1981 to pay $67,746.08 into the Registry

of this Court on or before July 1, 1981 for the purpose of defraying the costs of the Special Master and the Hearing Master.

In an opinion filed on December 23, 1977, this Court made findings of fact and conclusions of law in which it found that the defendants were violating the constitutional and statutory rights of the members of the plaintiff class by failing to provide them with minimally adequate habilitation in the least restrictive environment. By "adequate habilitation" we mean such education, training, and care as will better enable a retarded person to cope with life as effectively as his or her capacities will permit. As the trial record in this case reveals, all parties to this litigation admitted that the residents of Pennhurst were not receiving minimally adequate habilitation. The average stay of a resident at Pennhurst is 21 years, and the testimony showed that a majority of them had regressed in that their level of functioning had declined when compared to the skills which they possessed at the time of admittance to Pennhurst. On many occasions since the trial, all parties have agreed with the many experts who testified at the trial that normalization is now universally accepted as the most beneficial method of habilitating a retarded person. Normalization is the antithesis of institutionalization and is based upon the fact that the education, training and care of a retarded person should be accomplished in a community living arrangement. This Court found that Pennhurst as an institution is inappropriate and inadequate as a place to habilitate the retarded. At the trial, the Commonwealth represented that it intended to close Pennhurst in the early 1980's.

On January 6, 1978, this Court held a further hearing for the purpose of determining the relief which should be granted. The parties were asked to attempt to reach an agreement on the appropriate relief. When the parties informed the Court that they could not agree on an order, the Court requested that they submit separate proposed orders. Finally, on March 17, 1978, the Court issued an Order directing the County and Commonwealth defendants to provide adequate community living arrangements and services for the residents of Pennhurst and the other retarded persons who were awaiting admission to Pennhurst. This Court further ordered that individual habilitation plans be developed for each member of the plaintiff class, that appropriate community monitoring mechanisms be designed and implemented, and that a Special Master be appointed to monitor defendants' planning for and the providing of community living arrangements and services in addition to monitoring living conditions at Pennhurst. The primary function of the Special Master in this case is to monitor the actions of the Commonwealth and County defendants in an effort to make certain that the retarded residents of Pennhurst receive such treatment, care, and education in an unsegregated environment as this Court found they had a right to under the United States Constitution. That a Master is needed to monitor compliance with the Court's Orders is apparent from the fact that the defendants, when not faced with contempt proceedings during a period of more than two years from the entry of this Court's Order of March 17, 1978 through the end of August 1980, transferred only 122 of approximately 1,200 residents of Pennhurst to community living arrangements.

The defendants appealed and on December 13, 1979, the Court of Appeals issued an Order substantially affirming this Court's Order of March 17, 1978, and remanded the matter to this Court for further proceedings. As pointed out by our Circuit Court, the defendants contended that this Court's appointment of a Master was improper under Fed. R. Civ. P. 53(b). The Circuit Court, in rejecting this contention, stated:

> It is abundantly clear that providing the 1,200 Pennhurst residents with a right to habilitation in the least restrictive environment will be a complex and lengthy process, probably involving monitoring, dispute resolution, and development of detailed enforcement mechanisms. Were we to preclude the trial court from resorting to a master, we would help make self-fulfilling the frequently made prophecy that courts are institutionally incapable of remedying wholesale violations of legally protected rights.
>
> * * * * * * * *
>
> In this case, moreover, the court's resort to use of a master is particularly appropriate. After the decision on liability was announced, the appellants were afforded an opportunity to devise and present their own remedies for conditions at Pennhurst. They failed to do so. At that point, having received insufficient assistance from the officials directly involved, the court was faced with the choice of massive personal participation in devising a complex scheme for remedying the violations that were found, or of proceeding with the assistance of a master, whose functions would be supplementary to and

supervisory over those of the Commonwealth and County defendants. We hold that the trial court chose correctly in ordering the appointment of a master.

Halderman v. Pennhurst, 612 F.2d 84, 111-12 (3d Cir. 1979).

The Third Circuit also upheld this Court's "determination that, for the retarded class members as a whole, Pennhurst cannot be an appropriate setting in which to provide habilitation." (612 F.2d at 114). The Circuit Court in remanding the matter to this Court also directed that an individual hearing should be held for any Pennhurst resident who contends that the living arrangements and services available at Pennhurst are more beneficial to his or her habilitation than those made available in the community.

In light of the Third Circuit's opinion, this Court, on April 24, 1980, issued an Order incorporating and amending its prior Orders, including the March 17, 1978 Order. In its April 24, 1980 Order, this Court established an impartial hearing procedure and appointed a Hearing Master to provide an individual hearing for any resident of Pennhurst who claims that the living arrangements and services available at Pennhurst are more beneficial to habilitation than those made available in the community.

The United States Supreme Court granted *certiorari* in this case on June 10, 1980, and on June 30, 1980 entered a stay order pending final disposition. The Supreme Court's stay order limits transfers from Pennhurst to those retarded residents of Pennhurst whose transfer is "voluntary." On July 14, 1980, this Court ordered the Hearing

Master to hold a hearing for each Pennhurst resident for whom a community living arrangement has been prepared, for the purpose of determining whether the proposed transfer from Pennhurst to the community is "voluntary." On December 1, 1980, the Supreme Court declined to disturb this Court's interpretation and application of its limited stay order.

This Court's Orders provide that the Special Master and the Hearing Master shall be compensated by the Commonwealth defendants. (Orders of March 17, 1978, July 27, 1978, April 24, 1980, and June 10, 1980). For the fiscal years 1978-79, 1979-80, and 1980-81, the costs of the Masters have been paid by the Commonwealth. Funds for these payments were included in the Commonwealth's budget for Pennhurst. The Commonwealth defendants did not appeal any of the payment Orders for those fiscal years, nor did they ever question the amounts of those payment Orders. For fiscal year 1981-82, however, the Department of Public Welfare ("DPW") requested a separate appropriation to pay the amounts ordered by the Court to defray the expenses of the Masters. In its 1981-82 Budget Briefing Book, DPW stated that "the Special Master's responsibilities duplicate the authority and responsibility of either DPW/OMR or the counties funded by the Commonwealth for the purposes of service provision." It was further stated in the Budget Briefing Book:

> To meet the monthly Court Orders for payment to each Master, DPW/OMR has requested $.9 million. Although the dollars will not provide for the maintenance or expansion of client services in the community or Pennhurst itself, the dollars are sought

pursuant to Court Orders regarding funding of the Master's Offices.

The Honorable Helen O'Bannon, the Secretary of DPW, in testifying on March 4, 1981, before the House of Representatives Committee on Appropriations, made the following statements concerning the budget request for funds to pay the expenses of the Masters' offices as ordered by the Court:

> Representative Cohen: I'm just curious as to what power we have here, if any. Suppose we cut it to 450,000? What would happen? We would be ordered to increase it to $900,000.00?
>
> Secretary O'Bannon: No. Because you're not defendants on the suit.
>
> Representative Cohen: You as the Department?
>
> Secretary O'Bannon: I have no authority to increase it. I do not appropriate money.
>
> Representative Cohen: So therefore, you are saying we do have the authority to cut or increase?
>
> Secretary O'Bannon: Yes. And you always have that authority. Judge Broderick cannot take that away from you.
>
> Representative Cohen: And Judge Broderick has no reasonable means of recourse?
>
> Secretary O'Bannon: Judge Broderick is a very clever jurist. I would not like to guess his means of recourse.
>
> Representative Cohen: I am curious as to who would go to jail.

Representative Arty: I will take you in to protective custody.

Representative Cohen: To what degree is the $900,000.00 justified? In terms—

Secretary O'Bannon: I can't answer that. I think the whole masters office is a redundant, ridiculous piece of bureaucracy.

(Applause)

* * * * * * * *

Representative Cohen: We have no recourse other than to slash the budget from $900,000.00? If we don't want you to go to jail?

Secretary O'Bannon: You have all the recourse and power at your command and we will see what we will see. I am a risk taker. I wouldn't be in this job if I weren't.

On March 12, 1981, Secretary O'Bannon testified before the Senate Appropriations Committee concerning DPW's budget request for the Masters' costs. The following discussion took place at that hearing:

A. It's when—compliments of Judge Broderick's machinery, namely the Master—that we can't move anyone. Ah, and we have set up a decision-making, and a professional evaluation process outside the state system and outside the state and county's responsibility, named the Master. And nothing is good enough for the Master. And enough, and redundant enough, is never enough. In other words, we have got to do more and more.

So I think that, absent Judge Broderick's Order, you would see a much more orderly flow of lower

cost programs, in the sense that we would be able to serve more citizens through Wood-Haven.

Q. Okay. This is a third, and unfair question, but what do you think would happen if this legislature refused to fund the Master's Office of Judge Broderick? Would that go out of existence? Or, what would happen?

A. No, I think I would be held in contempt.

Q. You have already announced that you are going to, ah, ah, oppose the implementation of this latest Order.

A. Ah, I don't believe everything I read in the newspapers. Fortunately. What I did say was, I would not move people into the community before the community and the person was ready. I will not dump clients.

Senator Howard: Thank you both, Senator Early and Chairman Tilghman.

The Chairman: Just a second, I didn't hear it. Who would be held in contempt if we didn't fund it?

Secretary O'Bannon: I would. For not paying their bills.

The Legislature proceeded to cut the appropriation for the Masters' costs from $900,000 to $35,000, and added the following language:

> It is the intent of the General Assembly that this appropriation be used for shutdown costs and that no other funds of the Commonwealth be spent for these functions.

On June 4, 1981, this Court signed, and on June 5, 1981, the Clerk entered two orders for payment of the costs of the Special Master and the Hearing Master for the month of July, 1981, in the amounts, respectively, of $59,152.74 and $8,593.34, for a total of $67,746.08. The Orders specified that payment was to be made "on or before the first day of July, 1981."

In a letter dated June 25, 1981, the attorney for the Commonwealth defendants informed the Court that the Commonwealth would pay no more than the $35,000 for the expenses of the Masters for the fiscal year beginning July 1, 1981 through June 30, 1982.

The Commonwealth made no payment pursuant to the June 4, 1981 Order on or before July 1, 1981. At a conference on July 6, 1981, the Commonwealth advised the Court that it would soon be paying $35,000 into the Registry of the Court for the expenses of the Masters and that no additional sums would be paid for that purpose unless the Legislature passed a supplemental appropriation. On July 7, 1981, this Court issued an Order to show cause why the Commonwealth defendants should not be held in civil contempt in connection with their failure to comply with the Court's Order of June 4, 1981 to pay $67,746.08 into the Registry of the Court on or before July 1, 1981 for the purpose of defraying the costs of the Special Master and the Hearing Master. On or about July 13, 1981, the Commonwealth paid into the Registry of the Court the sum of $35,000. On July 16, 1981, this Court entered an Order directing that the $35,000 be paid to the Office of the Special Master and made a finding that the Commonwealth was in default in the amount of $32,746.08.

On July 14, 1981, this Court ordered the Commonwealth defendants to pay to the Registry of the Court for the operation of the Masters' Offices for the month of August, 1981, the sum of $67,746.07. The Commonwealth has not paid any sum for August and has advised the Court that it does not intend to make any further payments.

On July 24, 1981, at the hearing on the Order to show cause why the Commonwealth defendants should not be held in civil contempt, the Commonwealth again advised the Court that it did not intend to comply with the Court's Orders concerning the expenses of the Masters. The Commonwealth stated on the record that it was not "contest[ing] the underlying validity of [the Court's] Orders." (N.T. at 100). The Commonwealth contended, however, that "Helen O'Bannon [Secretary of DPW] is disabled from paying more than $35,000 to the Court for this purpose by valid legislative enactment." (N.T. at 90).

On four occasions since March 17, 1978, the defendants have asked this Court to stay its Orders. In each instance, the request for a stay has been denied. On seven occasions, the Court of Appeals and the United States Supreme Court have likewise refused to stay the basic thrust of this Court's Orders pending disposition of the appeals.

The United States Supreme Court has stated that "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. . . . If a state agency refuses to adhere to a court order, a financial

penalty may be the most effective means of insuring compliance." *Hutto v. Finney*, 437 U.S. 678, 690-91 (1978).

Liability for civil contempt accrues when a defendant violates an Order, knowing it to have been issued. *Thompson v. Johnson*, 410 F. Supp. 633 (E.D. Pa. 1976), *aff'd*, 556 F.2d 568 (3d Cir. 1977). The purpose of a civil contempt remedy is to coerce compliance with the court order and to compensate the party who is the beneficiary of the court order for the failure to comply. *Cromoglass Corp. v. Ferm*, 500 F.2d 601, 604 (3d Cir. 1974); *U.S. v. Spectro Foods Corp.*, 544 F.2d 1175, 1182-83 (3d Cir. 1976).

Commonwealth defendants assert a two-pronged defense to the contempt charge. It is claimed (1) that Secretary O'Bannon acted in good faith, and (2) that the action of the Legislature has raised a state law barrier to compliance. "Good faith" is not generally recognized as a defense to civil contempt. As the United States Supreme Court stated in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949):

> The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions. . . . An act does not cease to be a viola-

> tion of . . . a decree merely because it may have been done innocently.

"The fact that prohibited acts may have been done inadvertently or in good faith does not, in and of itself, preclude a finding of contempt." *Thompson v. Johnson,* 410 F. Supp. 633, 640 (E.D. Pa. 1976), *aff'd,* 556 F.2d 568 (3d Cir. 1977). Because the purpose of civil contempt is not to punish, but to correct, the role of the Court is not to fix blame on the defendants but rather to prevent a recurrence and to repair any damage that has been done. The Court's Order in this case must be obeyed by the Commonwealth defendants regardless of whether the defendants tried in good faith to carry out the terms of the injunction. *Landman v. Royster,* 354 F. Supp. 1292, 1300-01 (E.D. Va. 1973), citing *Doe v. General Hospital,* 434 F. 2d 427 (D.C. Cir. 1970).

The Court finds, however, that the evidence before the Court in this contempt proceeding clearly establishes that Secretary O'Bannon was not acting in good faith.

As heretofore pointed out, Secretary O'Bannon, in her testimony before the House of Representatives Committee on Appropriations on March 4, 1981, made statements which in effect suggested that the Committee *not* appropriate money for the Masters, and when asked whether it would be a violation of the Court's Order she replied "I am a risk taker. I wouldn't be in this job if I weren't." Again, on March 12, 1981, when she testified before the Senate Appropriations Committee, she once again made it clear to the Committee that she was *not* requesting funds for the Masters. And when asked what she thought would happen "if this legislature refused to fund the

Master's Office," her reply was: "I think I would be held in contempt." We find that this action of Secretary O'Bannon was a blatant attempt to defy this Court's Orders.

The actions of Secretary O'Bannon were apparently taken without the advice of counsel. The Attorney General of Pennsylvania who represents the Secretary in this litigation probably would not advise anyone to act in defiance of this Court's Order. The Attorney General, who is now an elected officer in this Commonwealth, has taken an oath to uphold the Constitution of the United States, Article VI of which provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the Land. . . ." As our Third Circuit recently stated:

> [T]he fourteenth amendment is the supreme law of the land in all of Pennsylvania. All executive officers of Pennsylvania, including the Attorney General, have taken the oath prescribed by Article IV, Section 6, Clause 3, to uphold that amendment. *See* 71 P.S. §761; Pa. Const. Art. 6 §3. By virtue of the supremacy clause, the Commonwealth has the same interest in compliance with the standard of conduct laid down by the fourteenth amendment as it has in compliance with standards of conduct enacted by the Pennsylvania Legislature.

Commonwealth of Pennsylvania v. Porter, Nos. 79-2653, 79-2684, 79-2685, slip op. at 16 (3d Cir., July 30, 1981).

Secretary O'Bannon was well aware when she made her statements to the House and Senate Appropriations Committees, as she is now, that the failure to pay the ex-

penses of the Special Master means that the Master's Office will be unable to function and will be forced to cease their functions of monitoring the actions of the Commonwealth for the purpose of ensuring that the residents of Pennhurst receive the minimally adequate habilitation ordered by this Court. The Special Master's Office and the Hearing Master's Office have been functioning without pay for the past six weeks. They have been working on a volunteer basis. The Commonwealth defendants are well aware that without pay these Offices will be compelled to cease functioning.

As heretofore pointed out (at pages 7-9), Secretary O'Bannon in her Budget Briefing Book and in her testimony before the House and Senate Appropriations Committees, stated that the functions of the Special Master duplicated services being performed by the Commonwealth and County defendants. The Secretary labelled the work of the Special Master as "redundant." Although Secretary O'Bannon's claims of duplication and redundancy may have influenced the Legislature, such allegations are not a defense to these contempt proceedings. The allegations of duplication and redundancy have never been raised by the Commonwealth defendants in this litigation. The primary function of the Special Master, as heretofore pointed out, is to monitor compliance with the Court's Orders. The Court therefore intends to issue a separate Order which will schedule a hearing for the purpose of determining what, if any, services being performed by the Special Master are duplicating work being performed by any defendant.

The Hearing Master was appointed pursuant to the suggestion of the Court of Appeals for the purpose of hold-

ing an individual hearing for any Pennhurst resident who contends that the living arrangements and services being provided at Pennhurst are more beneficial to habilitation than those made available for him or her in the community. The Hearing Master also holds hearings pursuant to the stay order of the Supreme Court to determine whether the transfer of a Pennhurst resident to the community is "voluntary." The functions of the Hearing Master are clearly not duplicative or redundant.

There is no question that federal court orders often incur the wrath of many people. There is also no question that the same United States Constitution that guarantees rights to the retarded citizens of this country, also guarantees to all its citizens the right to criticize and object. The Court wishes to make it clear that its finding that Secretary O'Bannon is in contempt is not in any way based upon her criticisms of this Court or its Orders. The Court's finding of contempt is based solely upon her acts and statements directed toward the abrogation of the Court's Order that specifically directed the Commonwealth defendants to fund the Masters' offices. Under our tripartite Constitutional form of government, an order of a federal court entered for the purpose of enforcing constitutional rights cannot be evaded by any citizen, even one who holds high public office and considers herself a "risk taker." Informed citizens and high public officials who are parties to litigation in a federal court are well aware that court orders must be obeyed until such time as the order is stayed or reversed on appeal. As heretofore indicated, the Commonwealth defendants in this litigation are well aware of the "stay" and appeal procedures.

The Court finds that Secretary O'Bannon and the Department of Public Welfare violated their obligation to act diligently and with steadfast purpose to effectuate the Orders of this Court. *Aspira v. Board of Education of City of New York*, 423 F. Supp. 647 (S.D. N.Y. 1976).

Commonwealth defendants' contention that the action of the Legislature prevents compliance with this Court's Orders is unpersuasive. As this Court recently stated:

> Should there come a day when [a legislative body] by a majority vote of its members, can overturn or obstruct a decision of the federal judiciary holding that the rights of a minority . . . were violated by the actions of . . . government, it would mean that the elected body . . . could effectively abrogate those inalienable rights guaranteed to all of us in the Constitution. It would mean that the judicial system of this nation, established pursuant to Article III of the Constitution, a judicial system upon which this nation has come to rely in times of crisis, would be without the power to enforce its decrees and would crumble. Fortunately, ours is a nation committed to the rule of law and our elected representatives are not above the law. It must be so under our Constitution, which guarantees rights to individuals, rights which cannot be destroyed by the democratically determined actions of the majority. It follows, therefore, that, although federal judicial decisions do frequently incur the wrath of the majority, under our tripartite constitutional form of government, such decisions are the law of the land and cannot be abrogated by legislative action. It is beyond question that legislative

action cannot negate a Constitutionally based judicial decision.

Resident Advisory Board v. Rizzo, 463 F. Supp. 694, 700 (E.D. Pa. 1979). The action of the Legislature of this Commonwealth in refusing to appropriate funds for the Masters and in expressing an intention that no other funds of the Commonwealth be used for the Masters cannot abrogate the Order of this Court based upon the right of the retarded residents of Pennhurst to such education, training, and care as will better enable them to cope with life as effectively as their capacities will permit. As heretofore pointed out, the Masters are an integral part of the remedy prescribed by this Court to make certain that the Commonwealth provides minimally adequate habilitation to the retarded residents of Pennhurst.

It is clear that a "[s]tate-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution." *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 99 S.Ct. 3055, 3079 (1979). As the United States Supreme Court stated in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

> It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any thing in the Constitution or Laws of any State to the contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 "to support this Constitution." Chief Justice Taney, speaking

for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. . . ." Ableman v. Booth, 21 How. 506, 524, 16 L.Ed. 169.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery. . . ." *United States v. Peters*, 5 Cranch 115, 136, 3 L.Ed. 53.

Thereafter, in *Miranda v. Arizona*, 384 U.S. 436, 490-91 (1966), the Supreme Court stated:

> Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

And as more recently reiterated by the Supreme Court in *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45 (1971): "[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees."

The action of the Pennsylvania legislature cannot and does not preclude compliance by the Commonwealth defendants with the Orders of this Court based upon the United States Constitution and a federal statute.

The costs for the Masters in this case are costs of litigation. *Newman v. State of Alabama*, 559 F.2d 283, 290 (5th Cir. 1977). It is well settled that "[w]hen a State defends a suit for prospective relief, it is not exempt from the ordinary discipline of the courtroom. . . . [A] federal court may treat a state like any other litigant when it assesses costs." *Hutto v. Finney*, 437 U.S. 678, 695-96 (1978). The award of such costs is not barred by the Eleventh Amendment. "Unlike ordinary 'retroactive' relief, such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses incurred in seeking prospective relief." *Id.* at 695 n. 2. The functions of the Masters solely involve present and future compliance with this Court's Orders, and do not relate to compensation of the plaintiffs for past violations of their rights. The payment of money for the Masters is not compensation of the plaintiffs for their confinement at Pennhurst but rather is a method of ensuring constitutionally adequate conduct by defendants in the future. Therefore, awarding the costs of the Masters against the Commonwealth defendants does not contravene the Eleventh Amendment. *Samuel v. University of Pittsburgh*, 538 F.2d 991, 999 (3d Cir. 1976).

For the reasons hereinabove set forth, this Court finds that Secretary O'Bannon and the Department of Public Welfare of the Commonwealth of Pennsylvania are in con-

tempt of the Orders of this Court dated June 4, 1981 and July 14, 1981, which require the Commonwealth defendants to pay the expenses of the Masters.

This Court will enter an Order imposing on Secretary O'Bannon and the Department of Public Welfare civil fines totalling $10,000 per day for each day after September 2, 1981, that full payment has not been made pursuant to this Court's Orders of June 4, 1981 and July 14, 1981. In the event Secretary O'Bannon and the Department of Public Welfare do not make full payment pursuant to the Orders of June 4, 1981 and July 14, 1981 on or before September 2, 1981, the plaintiffs will be directed to take such steps as are legally necessary to add the Honorable R. Budd Dwyer, Treasurer of the Commonwealth of Pennsylvania, as a party defendant in this action.

The Court will also enter an Order directing the Department of Public Welfare and Secretary O'Bannon to appear before this Court at 9:30 A.M. on Thursday, October 15, 1981, to show cause why the Court should not impose on them a compensatory fine in an amount sufficient to compensate the plaintiffs for the costs and counsel fees incurred in the preparation and trial of these contempt proceedings.

For the purpose of ascertaining the amount of the compensatory fine sufficient to compensate plaintiffs for costs and counsel fees, the plaintiffs will be ordered to submit affidavits on or before October 1, 1981, setting forth in detail the time expended by counsel, the matter upon which the time was expended, and the costs incurred in the preparation and trial of these contempt proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-1345

TERRI LEE HALDERMAN, ET AL
Plaintiffs

v.

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL
Defendants

UNITED STATES OF AMERICA
Plaintiff-Intervenor

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, ET AL
Plaintiffs-Intervenors

ORDER

AND NOW, this 25th day of August, 1981, the Court having held a hearing on July 24, 1981, on a Rule to Show Cause why the Commonwealth defendants should not be held in civil contempt for failure to comply with this Court's Orders of June 4, 1981 to pay $67,746.08 into the Registry of this Court on or before July 1, 1981 for the purpose of defraying the costs of the Special Master and the Hearing Master; the Court having found that the

Department of Public Welfare of the Commonwealth of Pennsylvania and the Honorable Helen O'Bannon, Secretary of the Department of Public Welfare, are in contempt of the Orders of this Court dated June 4, 1981 and July 14, 1981 which require the Commonwealth defendants to pay the expenses of the Masters: for the reasons set forth in this Court's Memorandum dated August 25, 1981, it is hereby ORDERED that:

1. The Department of Public Welfare and the Honorable Helen O'Bannon, Secretary of the Department of Public Welfare, shall pay into the Registry of this Court civil fines totalling $10,000 per day for each day after September 2, 1981, that full payment has not been made pursuant to this Court's Orders of June 4, 1981 and July 14, 1981.

2. In the event the Department of Public Welfare and the Honorable Helen O'Bannon, Secretary of the Department of Public Welfare, do not make full payment pursuant to the Orders of June 4, 1981 and July 14, 1981 on or before September 2, 1981, the plaintiffs shall take such steps as are legally necessary to add the Honorable R. Budd Dwyer, Treasurer of the Commonwealth of Pennsylvania, as a party defendant in this action.

3. The Department of Public Welfare and the Honorable Helen O'Bannon, Secretary of the Department of Public Welfare, shall appear before this Court on Thursday, October 15, 1981, at 9:30 A.M. in Courtroom 10B, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, to show cause why the Court should not impose on them a compensatory fine in an amount suffi-

cient to compensate the plaintiffs for the costs and counsel fees incurred in the preparation and trial of these contempt proceedings.

4. For the purpose of ascertaining the amount of the compensatory fine sufficient to compensate plaintiffs for costs and counsel fees, the plaintiffs shall submit affidavits on or before October 1, 1981, setting forth in detail the time expended by counsel, the matter upon which the time was expended, and the costs incurred in the preparation and trial of these contempt proceedings.

(s) R. J. Broderick
Raymond J. Broderick, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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TERRI LEE HALDERMAN et al.,
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v.

PENNHURST STATE SCHOOL AND HOSPITAL et al.,
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UNITED STATES OF AMERICA,
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PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,
Plaintiffs-Intervenors

MEMORANDUM

BRODERICK, J., January 8, 1982.

Defendants Commonwealth of Pennsylvania Department of Public Welfare and its Secretary, the Honorable Helen O'Bannon (hereinafter, the Commonwealth defendants), have filed with this Court a motion asking that they be purged of contempt and relieved of their obligation to make payments in the future of the coercive and compen-

satory civil contempt fine of $10,000 per day pursuant to this Court's Memorandum and Order of August 25, 1981, finding them in contempt for failing to fund the Offices of the Special Master and the Hearing Master in this case. For the reasons hereinafter set forth, the Court will purge the Commonwealth defendants of contempt and relieve the Commonwealth defendants of their obligation to make payments in the future based upon the Court's finding that the total fines paid to date will be used by this Court to carry out the Court's injunctive Orders in this case. The Court will use its equitable power over the fund created by the fines to finance the Offices of the Special Master and the Hearing Master during the remainder of the fiscal year 1981-82 in accordance with budgets approved by this Court, and in addition pay the past due obligations for operating the Masters' offices during the period from July 1, 1981 to October 21, 1981.

On August 25, 1981, this Court found the Commonwealth defendants were in civil contempt because of their failure to comply with this Court's Orders of June 4, 1981 to pay into the Registry of this Court $67,746.08 by July 1, 1981 for the purpose of defraying the expenses of the Special Master and the Hearing Master and July 14, 1981 to pay $67,746.08 into the Court Registry by August 1, 1981 for the same purpose.

As is well-known to the litigants, the Commonwealth defendants have been ordered (Orders of March 17, 1978, July 27, 1978, and April 24, 1980) to fund the Master's offices and, pursuant to monthly orders, pay into the Registry of this Court the amounts budgeted each month for the payment of the salaries, wages, and other expenses

of both the Hearing Master's office and the Special Master's office. On June 4, 1981, this Court signed, and on June 5, 1981, the Clerk entered two Orders for payment of the costs of the Special Master and the Hearing Master for the month of July, 1981, in the amounts, respectively, of $59,152.74 and $8,593.34, a total of $67,746.08. These Orders specified that payment was to be made "on or before the first day of July, 1981." The Commonwealth defendants made no payment pursuant to the Order of June 4, 1981 on or before July 1, 1981. At a conference on July 6, 1981, the Commonwealth advised the Court that it would soon be paying $35,000.00 into the Registry of the Court for the purpose of closing the Office of the Special Master and that no additional sums would be paid for that purpose unless the Legislature passed a supplemental appropriation.

On July 7, 1981, this Court issued an Order to show cause why the Commonwealth defendants should not be held in civil contempt in connection with their failure to comply with the Court's Order of June 4, 1981 to pay $67,746.08 into the Registry of the Court on or before July 1, 1981 for the purpose of defraying the costs of the Special Master and the Hearing Master. On or about July 13, 1981, the Commonwealth defendants paid into the Registry of the Court the sum of $35,000.00. On July 16, 1981, this Court entered an Order directing that the $35,000.00 be paid to the Office of the Special Master and made a finding that the Commonwealth defendants were in default in the amount of $32,746.08. Since that time, the Commonwealth defendants have failed to comply with eight subsequent funding Orders of this Court. The Commonwealth defendants' default now totals $371,-

478.27. On July 24, 1981, at the hearing on the Order to show cause why the Commonwealth defendants should not be held in civil contempt, the Commonwealth defendants again advised the Court that they did not intend to comply with the Court's Orders concerning the expenses of the Masters.

Based on these events and evidence adduced at the July 24 hearing, the Court concluded that the Department of Public Welfare and its Secretary, Helen O'Bannon, were in contempt of Court (Memorandum of August 25, 1981). Specifically, the Court found that as a result of the actions of the Secretary and the Department, the Legislature did not make an appropriation for the continued functioning of the Masters' offices (Memorandum of August 25, 1981 at 14-18). This Court's Order of August 25, 1981 directed the Department to fund the Master's offices on or before September 2, 1981 or commence paying into the Registry of this Court $10,000.00 per day as a civil contempt fine. Rather than fund the Masters' offices, the Commonwealth defendants have determined to remain in contempt of this Court's Orders and have, however, paid the civil fine of $10,000.00 per day. As of this date, the total amount of the civil fines paid into the Registry of this Court exceeds $1,200,000.00.

On October 21, 1981, the Court transferred $87,314.30 of the sum resulting from the Commonwealth defendants' payments of civil contempt fines to the Special Master and $13,695.60 to the Hearing Master. The Court ordered further transfer of the sum resulting from the payment of civil contempt fines, $80,371.12 to the Special Master and $13,588.14 to the Hearing Master. More than

$1,000,000.00 of the fund generated by the fine payments remains subject to Court Order.

As is now well-known to the litigants, this Court, in an opinion filed December 23, 1977, made findings of fact and conclusions of law holding that defendants were violating the constitutional and statutory rights of members of the plaintiff class by failing to provide them with minimally adequate habilitation in the least restrictive environment. As the trial record in this case reveals, all parties to this litigation admitted that the residents of Pennhurst were not receiving minimally adequate habilitation. The Court found that Pennhurst as an institution is inappropriate and inadequate to habilitate the retarded. At trial, the Commonwealth defendants represented that they intended to close Pennhurst in the early 1980's. This they have not done.

On January 6, 1978, this Court held a hearing to determine the injunctive remedy necessary. The parties were asked to attempt to agree on the terms of the Court's Orders, but no agreement was forthcoming. The Court requested that they submit separate proposed orders. On March 17, 1978, the Court issued an injunction which, among other things, created the Office of the Special Master. The Special Master was appointed to monitor defendants' planning for and the providing of community living arrangements and services in addition to monitoring living conditions at Pennhurst, as well as in the community facilities to which Pennhurst residents would be transferred. The Commonwealth defendants, when not faced with contempt proceedings during a two and a-half year period from the entry of this Court's Order of March 17, 1978

through the end of August, 1980, transferred only 122 of approximately 1,200 Pennhurst residents to community living arrangements. The Commonwealth defendants' failure to comply with this Court's Orders during that period underscored the need for the Masters' offices.

On December 13, 1979, the Court of Appeals approved this Court's appointment of the Special Master, and its "determination that, for the retarded class members as a whole, Pennhurst cannot be an appropriate setting in which to provide habilitation." (612 F.2d at 114). In remanding to this Court, the Court of Appeals directed that an individual hearing should be held for any Pennhurst resident who contends that the living arrangements and services available at Pennhurst are more beneficial to his or her habilitation than those made available in the community.

In light of the Third Circuit's opinion, this Court established an impartial hearing procedure and appointed a Hearing Master who was directed to provide an individual hearing for any Pennhurst resident who contended that his or her habilitation at Pennhurst would be more beneficial than that proposed in the community living arrangement. (Order of April 24, 1980).

This Court's Orders provide that the Special Master and the Hearing Master shall be compensated by the Commonwealth defendants (Orders of March 17, 1978; July 27, 1978; April 24, 1980; and June 10, 1980). The funds required for the operation of the Master's offices are costs of litigation under Federal Rules of Civil Procedure 53 and 54 and were assessed against one of the losing parties by this Court. The Commonwealth defendants did not

appeal these Orders. They complied with these Orders and paid the Master's costs during fiscal years 1978-79, 1979-80, and 1980-81. Funds for those payments were included in the Commonwealth's budget for Pennhurst. In fiscal year 1981-82, however, the Department of Public Welfare and Secretary Helen O'Bannon took steps which this Court found to have been designed to thwart the Court's Orders mandating funding for the Masters' offices. As hereinafter discussed in great detail, the Court found the Department and Secretary O'Bannon in contempt of court and imposed a compensatory coercive civil contempt fine upon the Commonwealth defendants for each day that the Masters' offices remained unfunded after September 2, 1981 (Order of August 25, 1981).

On September 3, 1981, United States Supreme Court Justice William J. Brennan, acting as Circuit Justice for the Third Circuit, issued a temporary stay of this Court's contempt Order pending full review of the Commonwealth defendants' application for a permanent stay pending appeal to the Third Circuit. The Third Circuit had already denied a stay. On September 17, 1981, Circuit Justice Brennan denied the application for a stay and vacated his temporary stay Order. The Commonwealth defendants, pursuant to Supreme Court rules, resubmitted the matter to Justice Rehnquist, who referred the application to the full Court, which denied the application for a stay on October 5, 1981.

As this Court has found, the continued operation of the office of the Special Master and the fulfillment of her duties on behalf of the retarded residents is necessary for the purpose of monitoring the defendants' compliance

with this Court's Orders and is essential for the purpose of assuring that the retarded residents of Pennhurst are being transferred to community facilities that are safe, sanitary and beneficial to their habilitation. The Hearing Master conducts hearings for each Pennhurst resident for whom a community living arrangement has been prepared for the purpose of determining whether the proposed transfer from Pennhurst to the Community is "voluntary", as well as for the purpose of determining whether the proposed community living arrangement will be beneficial to his or her habilitation. The Court is vitally concerned that no retarded resident of Pennhurst or any other member of the plaintiff class be transferred to any community living arrangement that is not beneficial to his or her habilitation. The Masters' offices ensure that the poor sanitation, safety, habilitation, and training conditions found to exist at Pennhurst are not duplicated on a smaller scale in community living arrangements.

For the reasons set forth in its Memorandum of January 6, 1982, the Court found the Commonwealth defendants likewise in contempt for their failure to comply with the Court's Orders of August, September, October, and November. In its Memorandum of August 25, 1981, the Court detailed its reasons for holding the Commonwealth defendants in contempt. Essentially, the Court found that Secretary O'Bannon and the Department had failed to act with due diligence and steadfast purpose to comply with the valid Orders of this Court. As a result, the Masters' offices were without funding.

The Court, in its Memorandum of August 25, 1981, concluded that it possessed inherent equitable powers to

effectuate compliance with its Orders through the imposition of civil contempt fines. The Court rejected Commonwealth defendants' argument that Secretary O'Bannon had acted in good faith, finding good faith inapplicable to a civil contempt proceeding. Furthermore, the Court found that she had not acted in good faith. The Court also rejected the Commonwealth defendants contention that the action of the Legislature raised a state law barrier to compliance by the Commonwealth defendants. *See* Memorandum of August 25, at 13-22. Thus, after various challenges to the Court's contempt Order, the Commonwealth defendants began paying a civil contempt fine of $10,000.00 per day.

The Commonwealth defendants, while paying $10,000.00 per day in fines, have nevertheless failed to comply with this Court's Orders of June 4, 1981, July 14, 1981, August 20, 1981, September 16, 1981, October 22, 1981, November 18, 1981, and November 24, 1981, ordering them to pay a total of $406,478.27 into the Registry of this Court for the purpose of defraying the costs of the Special Master and the Hearing Master. To date, the Commonwealth defendants have paid only $35,000.00 of this amount.

The Commonwealth defendants maintain that they have been unable to comply with the funding Orders of this Court because the Legislature failed to appropriate a special fund for the Masters' offices for the fiscal year 1981-82 and that, therefore, no funds will be forthcoming from the Commonwealth defendants for the remainder of the fiscal year. The Court remains unimpressed with this contention and has not been persuaded that the Common-

wealth defendants have been totally without funds sufficient to comply with the Court's Orders. Nevertheless, the Court finds that the contempt of the Commonwealth defendants has inflicted a continuous harm on the plaintiff class which will continue until at least July 1, 1982.

On July 24, 1981, at the hearing on the Order to show cause why the Commonwealth defendants should not be held in civil contempt, the Commonwealth defendants advised the Court that they did not intend to comply with the Court's Orders concerning the expenses of the Masters. However, the Commonwealth defendants stated at that hearing that they were not "contest[ing] the underlying validity of [the Court's] Orders." (N.T. at 100).

The United States Supreme Court has stated that "federal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced. . . . If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance." *Hutto v. Finney*, 437 U.S. 678, 690-91 (1978).

Liability for civil contempt accrues when a defendant violates an order, knowing it to have been issued. *Thompson v. Johnson*, 410 F. Supp. 633 (E.D. Pa. 1976), *aff'd*, 556 F.2d 568 (3d Cir. 1977). The purpose of a civil contempt remedy is to coerce compliance with the court order and to compensate the party who is the beneficiary of the court order for the failure to comply. *Cromoglass Corp. v. Ferm*, 500 F.2d 601, 604 (3d Cir. 1974); *U.S. v. Spectro Foods Corp.*, 544 F.2d 1176, 1182-83 (3d Cir. 1976).

On December 4, 1981, the Commonwealth defendants filed with this Court a motion to "modify" the contempt order and "purge" them of the contempt. Commonwealth defendants styled this request as a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. However, a close examination of the relief requested by the Commonwealth defendants and the reasoning supporting that request shows their motion is a motion addressed to the Court's inherent power to purge defendants of contempt. The Court has therefore considered the motion as one requesting a purging of the Commonwealth defendants' contempt and termination of their obligation to continue payment of the daily fines.

Although the Commonwealth defendants have taken no affirmative action to comply with the Court's Orders, they have paid a daily fine of $10,000.00 per day. These payments now exceed $1,200,000.00. To date, twelve orders of this Court requiring funding for the Masters have gone unheeded by the Commonwealth defendants. The Masters' offices regained funding for full-scale operation on October 21, 1981, when, pursuant to this Court's Order of October 20, 1981, $87,314.40 and $13,695.60 in funds created by the Commonwealth defendants' payment of the civil contempt fines were transferred to the Special Master and the Hearing Master, respectively.

On December 11, 1981, the Court transferred $80,371.21 of the fine payments to the Special Master and $13,588.48 of the fine payments to the Hearing Master to enable these offices to continue full-scale operation after the funds transferred on October 20, 1981 were exhausted. Thus far, the offices of the Special Master and

the Hearing Master have spent approximately $130,000.00 of the funds generated by the payment of civil contempt fines during the period October 21, 1981 through January 3, 1982.

As the Commonwealth defendants have pointed out, they have paid into the Court Registry more money than the Masters' budgets for the fiscal year in question. They assert, and the Court acknowledges, that it seems inequitable to continue collecting fines when the funds collected exceed the amounts needed to enable the Masters' offices to operate. For this reason, the Court will relieve the Commonwealth defendants of their obligation to continue paying the $10,000.00 per day civil contempt fine.

As this Court determined in its Memorandum of October 21, 1981, a federal court possesses broad equitable power to apply funds generated by civil contempt fines in order to accomplish the purpose of the injunction violated. *See* Memorandum of October 21, 1981 at 8-10. The Special Master and the Hearing Master are necessary to ensure that members of the plaintiff class receive the full constitutional and statutory rights to which they are entitled. This Court will continue to exercise its equitable right to apply the fund resulting from fine payments in order to carry out its injunctive orders.

Since transferring some of the fund created by the payment of civil contempt fines on October 21, 1981, this Court has required that the Special Master and the Hearing Master each week submit to the Court a list of proposed expenditures for the week. The Court reviews these expenditures, approving only those that are consistent with the Court's Memorandum of October 21, 1981 and Order

of October 20, 1981. Since the Masters' offices resumed full-scale operation on October 21, 1981, expenditures have averaged $10,665.00 per week for the Special Master and $1,699.00 per week for the Hearing Master. Extrapolated, this would result in expenditures of approximately $550,000.00 per year for the Special Master and $90,000.00 per year for the Hearing Master, compared with the 1981-82 proposed budgets submitted by the Commonwealth defendants to the Legislature totaling $900,000.00. These recent expenditures indicate a reduction of more than 25 percent in the Masters' budgets. The Masters have taken steps, pursuant to the Court's close supervision, to operate in the least costly and most efficient manner possible.

The Court has requested the Special Master and the Hearing Master to provide the Court with a budget through June 30, 1982 conditioned on the representations of the Commonwealth defendants that they will perform meaningful reviews of the individual habilitation plans developed for members of the plaintiff class. These submissions indicate that, for the 1981-82 fiscal year ending June 30, 1982, the Special Master and the Hearing Master will require $343,585.00.

In approving the budget of the Special Master for the 1981-82 fiscal year, which ends on June 30, 1982, the Court has assumed that the Commonwealth defendants will adequately perform the task, which they have agreed to undertake, of reviewing individual habilitation plans and will in the future commence the essential task of conducting meaningful inspection of all community living arrangements to which the members of the plaintiff class

are transferred so that the health, safety, and habilitation hazards found to exist at Pennhurst are not duplicated on a smaller scale in the community. The Court will, therefore, enter an Order authorizing the Clerk of the Court to pay on the first day of February, March, April, May, and June such sums as are approved by this Court for the purpose of operating the Masters' offices. The remainder of the fund generated by the Commonwealth defendants' payment of civil contempt fines will be held in interest-bearing accounts pending further orders of this Court.

The Order authorizing continued funding to the Offices of the Special Master and the Hearing Master through June 30, 1982, which the Court will enter on this date, does not involve funds that will be needed to pay past due obligations incurred by the Offices of the Special Master and the Hearing Master during the July 1, 1981 to October 21, 1981 period when the Masters were deprived of funding prior to this Court's Order of October 20, 1981 transferring funds resulting from the civil contempt fines. The Court will direct the Masters to submit to this Court detailed accounts of these past obligations and will at a later date enter an Order transferring from the fund resulting from fine payments a sufficient amount to pay such of these obligations as are approved by the Court. The Special Master and the Hearing Master shall submit these reports on or before February 15, 1982.

The Commonwealth defendants, although they have failed to comply with the Orders of this Court, will nevertheless be purged of the contempt in view of the fact that they have paid fines in an amount sufficient to comply with this Court's injunctive Orders requiring them to pay

the costs of the Masters, and will be relieved of this obligation to continue to pay $10,000.00 per day in coercive and compensatory civil contempt fines. An appropriate Order will be accordingly entered.

Memorandum, District Court,
January 8, 1982
Order

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-1345

TERRI LEE HALDERMAN et al.,
Plaintiffs

v.

PENNHURST STATE SCHOOL AND HOSPITAL et al.,
Defendants

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS et al.,
Plaintiffs-Intervenors

ORDER

AND NOW, this 8th day of January, 1982, for the reasons set forth in this Court's Memorandum of January 8, 1982,

IT IS HEREBY ORDERED:

1. The Commonwealth defendants are as of this date relieved of their obligation to continue to pay into the Registry of this Court a coercive and compensatory civil contempt fine of $10,000 per day as ordered by this Court on August 25, 1981;

2. The Commonwealth of Pennsylvania Department of Public Welfare and its Secretary, the Honorable Helen O'Bannon, are purged of the civil contempt found by this Court in its Orders of August 25, 1981 and January 6, 1982.

IT IS FURTHER ORDERED:

3. The Clerk of Court is authorized, commencing February 1, 1982 and on the first day of March, April, May, and June, 1982 to pay to the Special Master and the Hearing Master from the fund resulting from the payment of civil contempt fines such sums as shall be ordered by this Court, with the understanding that the Clerk of Court will continue to hold the balance of the fund in an interest-bearing bank account or in 13-week Treasury bills;

4. On or before February 15, 1982, the Special Master and the Hearing Master shall submit to this Office detailed accounts of past due obligations incurred by the Offices of the Special Master and the Hearing Master prior to October 21, 1981.

(s) R. J. Broderick
Raymond J. Broderick, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2381

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman; LARRY TAYLOR, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; KENNY TAYLOR, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; ROBERT SOBETSKY, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky; THERESA SOBETSKY, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky; NANCY BETY BOWMAN, a retarded citizen, by her parents and guardians, Mr. and Mrs. Horace Bowman; LINDA TAUB, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub; GEORGE SOROTOS, a minor, a retarded citizen, by his foster parents, William and Marion Caranfa, all of the above individually and on behalf of all others similarily situated; THE PARENTS AND FAMILY ASSOCIATION OF PENNHURST

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight, DAVID PREUSCH, a minor by his parents and next friends, Calvin and Eliza-

beth Preusch, and CHARLES DiNOLFI, on behalf of themselves and all others similarly situated, Plaintiffs-Intervenors

UNITED STATES OF AMERICA, Plaintiff-Intervenor

v.

PENNHURST STATE SCHOOL & HOSPITAL, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, FRANK S. BEAL, Secretary of the Department of Public Welfare, Stanley Meyers, Deputy Secretary for Mental Retardation, Department of Public Welfare, HELENE WOHLGEMUTH, Former Secretary, Department of Public Welfare, ALDO COLAUTTI, Executive Deputy Secretary, Department of Public Welfare, WILBUR HOBBS, Deputy Secretary for Southeastern Region, Department of Public Welfare, RUSSELL RICE, JR., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare, C. DUANE YOUNGBERG, Superintendent, Pennhurst State School & Hospital, ROBERT SMILOVITZ, Former Superintendent, Pennhurst State School & Hospital, MARGARET GREEN, BETTY UPHOLD, ALICE BARTON, P. E. KLICK, DR. PAROCCA, HELEN FRANCIS, employees and agents of Pennhurst State School & Hospital, JOHN DOCTOR, JAMES NURSE, JANE AIDE, JILL THERAPIST, RICHARD ROE, JANE DOE, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant sued individually and in his or her official capacity, GEORGE METZGER, JOSEPH CATANTA, and ROGER BOWERS, Commissioners for Bucks County, ROBERT STREBL, EARL BAKER, and LEO McDERMOTT, Com-

missioners for Chester County, FAITH R. WHITTLESEY, CHARLES KEELER, and WILLIAM SPINGLER, Commissioners for Delaware County, A. RUSSELL PARKHOUSE, FRANK W. JENKINS and LAWRENCE H. CURRY, Commissioners for Montgomery County, MAYOR FRANK L. RIZZO and THE CITY COUNCIL OF PHILADELPHIA, as Authorities for Philadelphia County, PETER BODENHEIMBER, Mental Health/Mental Retardation Administration for Bucks County, WILLIAM A. McKENDRY, Mental Health/Mental Retardation Administrator for Chester County, P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delaware County, HERMANN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County, and LEON SOFTER, Mental Health/Mental Retardation Administrator for Philadelphia County

Helen O'Bannon and the Department of Public Welfare,
Appellants In No. 81-2381

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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Hearing en Banc November 23, 1981

Before: Seitz, *Chief Judge*, and Aldisert, Gibbons, Hunter, Weis, Garth, Higginbotham and Sloviter, *Circuit Judges*

(Filed February 26, 1982)

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OPINION OF THE COURT

Gibbons, *Circuit Judge*, with whom Judges Aldisert, Weis, Higginbotham and Sloviter join:

The Honorable Helen O'Bannon, Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania, and that Department, appealed from an August 25, 1981, order of the District Court holding them in civil contempt, after a hearing, for failure to comply with the terms of the court's orders of June 4, 1981, and July 14, 1981. Those orders directed that the Commonwealth of Pennsylvania pay into the Registry of the District Court estimated costs for the operation of the Office of Special Master created under the terms of prior orders in this protracted lawsuit. The plaintiffs have moved to dismiss the appeal from the contempt order for want of an appealable order. We conclude that we have appellate jurisdiction, and we affirm.

I

This civil contempt proceeding arises out of a class action granting injunctive relief against the fact or conditions of confinement in Pennhurst State School and Hospital (Pennhurst) of persons suffering mental retardation. The action was commenced in May of 1974 by Terri Lee Halderman, a minor resident of Pennhurst. A motion by the United States to intervene as a plaintiff was granted in January, 1975, and the Pennsylvania Association for Retarded Citizens (PARC) successfully moved to intervene thereafter. The Commonwealth defendants are the Department of Public Welfare, the Sec-

retary of the Department, and a number of state officials having responsibility for the habilitation of the mentally retarded in Pennsylvania and for the operation of Pennhurst. Additional defendants, not involved in the contempt proceedings, are five counties of southeastern Pennsylvania which, under Pennsylvania law, share responsibility with the Commonwealth for the habilitation of the mentally retarded. After extensive pretrial discovery and a lengthy trial, the District Court in December 1977 made findings of fact and conclusions of law holding that the rights of class members secured to them by the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50, §§4101-4704 (Purdon 1969) (MH/MR Act of 1966), by several federal statutes, and by the federal constitution were being violated.[1] When the parties were unable to agree on an order which would remedy the continuing violations of law which the district court found, on March 17, 1978 the Court issued a permanent injunction ordering that Pennhurst eventually be closed and that suitable community living arrangements and necessary support services be provided for its residents. Particularly relevant to the contempt proceedings is the provision in the March 17, 1978 order for the appointment of a Special Master to supervise the planning and implementation of arrangements for placing Pennhurst residents elsewhere, and for the operation of Pennhurst until such placements were accomplished. Paragraph 8 of the District Court's March 17, 1978 order provided that

> [t]he Master shall engage such staff of his or her own as he or she finds necessary, subject to the ap-

[1] The District Court opinion is reported at 446 F. Supp. 1295 (E.D. Pa. 1977).

> proval of the Court. The Master and his or her staff shall be compensated by the commonwealth defendants at a rate to be set by the court; the expenses of the mastership to be borne by the commonwealth defendants.[2]

All defendants appealed from the March 17, 1978 Order. An application to stay that order was denied by the District Court,[3] and a panel of this Court denied a stay pending appeal. Before this Court the Commonwealth defendants opposed the March 17, 1978 order in all respects, but in particular because (1) the prospective relief which was ordered required the expenditure of Commonwealth funds, and (2) the appointment of a Special Master was improper. This Court expressly rejected both of those objections.[4] For the most part we affirmed the District Court's order. We did, however, conclude that in ordering that Pennhurst be closed and in prohibiting all future admissions to that institution, the judgment went beyond what the law required. Instead, we held individual determinations of need were required for each present resident or future admittee.

> [I]nstitutionalization is a disfavored approach to habilitation. Only where the court or the Master finds that an improved Pennhurst is the only appropriate place for individual patients should it be used. For all other patients, CLAs must be provided. We caution both the trial court and the Master that

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[2] *Id.* at 1327.

[3] Halderman v. Pennhurst State School & Hospital, 451 F. Supp. 233 (E.D. Pa. 1978).

[4] Halderman v. Pennhurst State School & Hospital, 612 F.2d 84, 109, 111 (3d Cir. 1979).

> before ordering transfers to CLAs they must have assurances that the sanitary, staffing, and program deficiencies which were found at Pennhurst are not duplicated on a smaller scale in the CLAs.[8]

Thus both the March 17, 1978 judgment and our opinion and judgment affirming and modifying it, contemplated a significant ongoing role for the Special Master both with respect to the internal conditions at Pennhurst and with respect to returning Pennhurst inmates to a more normal environment. Even those judges who dissented from the provisions of the judgment requiring steps toward normalization of inmates rather than perpetual confinement made no objection to the use of a Special Master to bring about an internal improvement of the intolerable conditions at Pennhurst. The judgment on appeal therefore made no change in the provision in paragraph 8 of the District Court's March 17, 1978 judgment ordering the Commonwealth to pay the expenses of the Master. In that respect this Court was unanimous.

The March 17, 1978 order in relevant respects has been in place and unstayed at all times since. It was the clear understanding of the Court and all parties that the costs of the Special Master's office be borne by the Commonwealth. This clear understanding is confirmed by the fact that beginning in 1978, each of the District Court's periodic orders for payment of the cost of the Master was directed to the Commonwealth as such. In compliance with the mandate of this Court the scope of the Master's duties was modified by a District Court order of April 24, 1980, which established an impartial hearing pro-

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[8] *Id.* at 116 (footnote omitted).

cedure and appointed a Hearing Master to provide an individual hearing for Pennhurst residents who desired to live in the community. No appeal was taken from the April 24, 1980 order, which modified the March 17, 1978 injunction. After the April 24, 1980 modification, the Court continued the prior practice of issuing periodic payment orders to the Commonwealth. No appeal was ever taken by the Commonwealth from any of these periodic payment orders. They all were honored by payment until the order of June 4, 1981.

On June 10, 1980 the Supreme Court granted certiorari from the prior judgment of this Court.[6] Prior thereto no stay of our mandate had been sought. Thus the modification of the March 17, 1978 judgment by the April 24, 1980 District Court order establishing a Hearing Master was plainly within the District Court's jurisdiction and complied with our mandate. On June 30, 1980 the Supreme Court entered a partial stay of the judgment of the Court of Appeals "to the extent that the judgment mandates the movement of residents of the Pennhurst facility to 'appropriate community living arrangements' " but denied a stay in all other respects.[7] Among the requests to the Supreme Court for a stay which were considered and denied were several addressed to the operation of the Office of Special Master.[8] When advised of the Supreme Court's action on the application for a stay, the District Court on July 14, 1980 further modified the injunction only to the extent of directing the Hearing Master, pro-

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[6] 449 U.S. 980 (1980).

[7] 448 U.S. 905 (1980).

[8] *See* Memorandum of Judge Broderick, July 29, 1980, No. 78-1490, 42a-43a.

vided for in the April 24, 1980 order, to determine whether transfers out of Pennhurst were voluntary. All involuntary transfers to community living arrangements were terminated pending a further ruling by the Supreme Court.[9] No appeal was taken from this order, which enlarged the role of the Masters slightly.[10] After entry of the July 14, 1980 order, the Commonwealth continued to make payments in compliance with the Court's periodic payment orders, until June of 1981.

On April 20, 1981 the Supreme Court reversed the judgment of this Court and remanded with a direction for further proceedings in conformity with the opinion of the Court.[11] The Supreme Court's judgment did not affect the District Court's March 17, 1978 judgment as modified by the April 24, 1980 and July 14, 1980 orders. Insofar as those orders deal with the expense of the Special Master's office, those orders have been in effect at all relevant times. Moreover, the Court's periodic payment orders of June 4, 1981 directing the Commonwealth to pay $67,746.08 have not been appealed by anyone, and the Commonwealth as such has not appealed the July 14, 1981 periodic payment orders. In the opinion on remand from the Supreme Court, filed simultaneously herewith, we again substantially affirm the March 17, 1978 judgment, including its provisions for use of a Special Master. The civil contempt, therefore, is of the orders of June 4, 1981 and July 14, 1981 which do no more than fix the amount and

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[9] No. 78-1490, 39a.

[10] Some defendants petitioned for a writ of mandamus which the Supreme Court on December 1, 1980 denied. In re Pennhurst Parent-Staff Association, 449 U.S. 1009 (1980).

[11] *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

time of payment of the unreversed provision in paragraph 8 of the March 17, 1978 order that the expenses of the Masters' offices shall be borne by the Commonwealth.

II

The Commonwealth of Pennsylvania appropriates funds annually for the Department of Public Welfare, of which Pennhurst is a part. For the fiscal years 1978-79, 1979-80 and 1980-81 general appropriations were made for State Centers for the Mentally Retarded, and from those appropriations payments were routinely made for the support of the Masters' offices. Sometime in late 1980 or early 1981 someone in the Department of Public Welfare conceived the idea of separating out from the general appropriation for State Centers for the Mentally Retarded a distinct appropriation for the operation of the Masters' offices. Secretary O'Bannon decided to depart from the prior practice, and was successful in having a separate item for the Masters' offices included in the Governor's budget requests. In testimony before the legislature O'Bannon voiced strong objections to the use of the Masters.[12] She explained that the anticipated cost was $900,000, and this colloquy took place:

> Representative Cohen: I'm just curious as to what power we have here, if any. Suppose we cut

[12] She testified, for example, "I think the whole masters office is a redundant, ridiculous piece of bureaucracy." 17a. Secretary O'Bannon was not in office when the Commonwealth, after the District Court's liability opinion, passed up the opportunity to suggest a less redundant but equally effective plan for achieving the relief the law required. There may be merit in her redundancy objection, but it was never advanced in the appropriate forum.

it to 450,000? What would happen? We would be ordered to increase it to $900,000.00?

Secretary O'Bannon: No. Because you're not defendants on the suit.

Representative Cohen: You as the Department?

Secretary O'Bannon: I have no authority to increase it. I do not appropriate money.

Representative Cohen: So therefore, you are saying we do have authority to cut or increase?

Secretary O'Bannon: Yes. And you always have that authority. Judge Broderick cannot take that away from you.

Representative Cohen: And Judge Broderick has no reasonable means of recourse?

Secretary O'Bannon: Judge Broderick is a very clever jurist. I would not like to guess his means of recourse.

Representative Cohen: I am curious who would go to jail?

Representative Arty: I will take you in to protective custody.

. . .

Representative Cohen: And we have to pay the salaries?

Secretary O'Bannon: I have been ordered to send a check every month.

Representative Cohen: We have no recourse other than to slash the budget from $900,000.00? If we don't want you to go to jail?

> Secretary O'Bannon: You have all the recourse and power at your command and we will see what we will see. I am a risk taker. I wouldn't be in this job if I weren't.

16a-19a.

At the time of this colloquy the Supreme Court had not yet decided the case pending before it on certiorari. On March 2, 1981, the day before O'Bannon's testimony, the district judge, dissatisfied with the slow pace of implementation of the order that community living arrangements be found for qualified and interested Pennhurst residents, had entered a supplemental order calling for the provision of additional services to class members within a specified time frame.[13] No notice of appeal was filed with respect to the March 2, 1981 order,[14] but in the testimony before the legislature Secretary O'Bannon expressed her dissatisfaction with it. Indeed, she testified that if the Court's order went into effect and there were not appropriate support facilities "[w]e will not comply and we will be in contempt. I will not dump patients out of Pennhurst for any court order." 23a. At a later point in the legislative hearing the focus of the inquiry returned to the Office of Special Master, and this colloquy occurred:

> Representative Pitts: Just one other question. The Office of Special Master, what did you say or what do you think would happen if we didn't not find [sic] this?

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[13] No. 78-1490, 47a.

[14] On May 26, 1981 this court denied a motion to stay the March 2, 1981 order, from which no appeal had been taken.

Secretary O'Bannon: If you put no money in this line item, we would continue to pay it as we are presently being ordered to do out of the Pennhurst budget.

Representative Pitts: You would be obligated to do that?

Secretary O'Bannon: I believe so.

. . .

Mr. Brown: I would like to follow upon what Representative Pitts was asking you, Madame Secretary, and take a little step further. This body has been known on occasion to write into a bill that thou shalt not. What would happen if we let the line item sit and say thou shall not pay any of Pennhurst's money to the Master?

Representative DeVerter: We will go to jail.

Representative Sirianni: I am willing to go to jail.

Mr. Brown: I would go, too. I don't expect you to answer that. . . .

30a-31a. There followed a brief discussion of the Willowbrook litigation in New York, and the fact that the New York legislature had omitted a line item in an appropriation for the funding of a hearing panel.[18] Secretary O'Bannon explained:

On one level, I think it is a different situation because we are under litigation and this is an arm of the court. We have not consented. In Willow-

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[18] *See* New York State Ass'n for Retarded Children, Inc. v. Carey, 631 F.2d 162 (2d Cir. 1980).

> brook, there was a consent decree in creation of a panel there. I would not be optimistic for this coming year that technique would work, but maybe in subsequent years. But I am an optimist to believe that the Supreme Court is going to rule in favor of the Commonwealth and there will be no master and no Judge Broderick order after June 30, 1981. All of this discussion may be just for our own entertainment.

32a-33a.

Despite O'Bannon's dubiety about whether Mr. Brown's suggested technique would work, the Pennsylvania General Assembly accepted his suggestion. It appropriated, as a line item appropriation, $35,000 for the masters, adding:

> It is the intent of the General Assembly that this appropriation be used for shutdown costs and that no other funds of the Commonwealth be spent for these functions.

That appropriation bill was passed by the House on June 17 and the Senate on June 22 and signed by the Governor on July 1, 1981. As late as June 22, 1981 O'Bannon and others in the Department of Public Welfare discussed the possibility of requesting a veto of the legislative expression of intention, but no steps were taken to that end.[16]

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[16] In other circumstances when the Governor of Pennsylvania learned that the legislature was attempting to interfere with a valid order of a federal court by passing a statute to abrogate that order, he refused to cooperate. In August 1978, the District Court for the Eastern District of Pennsylvania approved a consent decree requiring the Commonwealth to implement a motor vehicle

Meanwhile, before the appropriations bill became law, the district court's June 4 orders directing payment of the expenses of the masters by July 1, was entered and served on the Commonwealth and O'Bannon. The Department's general counsel, on June 23, 1981, sent a memorandum to the Department's Comptroller advising him that the payments required by the June 4 orders should not be made. (Exhibit P. 34). In a letter dated June 29, 1981 the attorney for the Commonwealth defendants informed the court that the Commonwealth would pay no more for the Masters' expenses for the fiscal year July 1, 1981-July 30, 1982 than $35,000. Defendant Howse, a Deputy Secretary of the Department, on July 1, 1981 sent the Comptroller a conflicting instruction to comply with the June 4 orders (Exhibit P. 36), but the next day O'Bannon concluded that those orders should not be obeyed. The general counsel of the Department thereupon instructed the Comptroller to ignore Howse's instruction and to withhold payment. (Exhibit P. 37).

It appears, therefore, that as soon as the appropriations bill became law the Department of Public Welfare, acting through some of its highest officers, took the position that they would not obey the June 4 orders, and so advised the court. No Rule 60(b) motion was made for relief from either the June 4 payment orders or the under-

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emission inspection and maintenance program. *Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania*, No. 76-2068, 77-619 (E.D. Pa., Consent Decree Aug. 30, 1978). In 1979, the legislature attempted to interfere, but Governor Thornburgh vetoed the bill. *See* Veto Message re House Bill 456 from Governor Thornburgh to the House of Representatives (July 10, 1979). The legislature subsequently overrode the veto.

lying provisions of the March 17, 1978, April 24, 1980, July 14, 1980 or March 2, 1981 injunctions specifying the Masters' duties and the Commonwealth's obligation to fund their services.

When advised of the Commonwealth's position, the original plaintiffs moved for the issuance of an order directing the Commonwealth defendants to show cause why they should not be held in contempt. The moving papers referred to the March 17, 1978, April 24, 1980 and June 4, 1981 orders and to the letter from counsel for the Commonwealth defendants informing the court that no funding for the masters would be made beyond $35,000. The defendants' answer admitted the facts alleged, but denied that they amounted to a contempt. An order to show cause issued, and on July 24, 1981 a hearing was held. At the hearing, counsel for respondents O'Bannon and the Commonwealth stated on the record that they were not contesting the underlying validity of the court orders. Transcript of July 14, 1981 Hearing at 90-100. They have consistently maintained that position. Before this court they assert:

> The sole issue [in the contempt proceeding] was defendants'/appellants' ability to comply with District Court orders requiring them to pay the expense of court-appointed masters. The propriety of those orders in and of themselves was not at issue.

Appellants' Reply Brief at 1.

O'Bannon did not testify in the contempt proceeding, but on her behalf it was urged that she acted in good faith but was prevented from obeying the court's orders by forces beyond her control. The district court, on the evi-

dence presented, found that she was not acting in good faith, but had instigated the action of the legislature for the purpose of creating an excuse for dismantling the Masters' offices. 61a. The court found that O'Bannon and the Department of Public Welfare of the Commonwealth were in contempt of the June 4, 1981 and July 14, 1981 orders, and ordered:

> 1. The Department of Public Welfare and the Honorable Helen O'Bannon, Secretary of the Department of Public Welfare, shall pay into the Registry of this Court civil fines totalling $10,000 per day for each day after September 2, 1981, that full payment has not been made pursuant to this Court's Orders of June 4, 1981 and July 14, 1981.
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> 2. In the event the Department of Public Welfare and the Honorable Helen O'Bannon, Secretary of the Department of Public Welfare, do not make full payment pursuant to the Orders of June 4, 1981 and July 14, 1981 on or before September 2, 1981, the plaintiffs shall take such steps as are legally necessary to add the Honorable R. Budd Dwyer, Treasurer of the Commonwealth of Pennsylvania, as a party defendant in this action.
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> 3. The Department of Public Welfare and the Honorable Helen O'Bannon, Secretary of the Department of Public Welfare, shall appear before this Court on Thursday, October 15, 1981, at 9:30 A.M. in Courtroom 10B, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, to show cause why the Court should not impose on them a compensatory fine in an amount sufficient to com-

pensate the plaintiffs for the costs and counsel fees incurred in the preparation and trial of these contempt proceedings.

4. For the purpose of ascertaining the amount of the compensatory fine sufficient to compensate plaintiffs for costs and counsel fees, the plaintiffs shall submit affidavits on or before October 1, 1981, setting forth in detail the time expended by counsel, the matter upon which the time was expended, and the costs incurred in the preparation and trial of these contempt proceedings.

72a-73a. From this order O'Bannon and the Commonwealth appeal. Paragraph 3 of the order establishes that its intended effect is that the Commonwealth should pay the $10,000 a day civil fine. The parties agree that the payments required by the June 4 and July 14, 1981 orders have never been made, and that the Commonwealth has, since September 2, 1981, paid into the Registry of the District Court fines at the rate of $10,000 a day.[17] By order of January 8, 1982, the District Court relieved the Commonwealth of the obligation to continue to pay into the Registry of the Court the coercive and compensatory civil fine and purged the Commonwealth Department of Public Welfare and Secretary O'Bannon of civil contempt.

III

The provisions of the District Court's order and the nature of a civil contempt proceeding present difficult

[17] The records of the Clerk of the United States District Court for the Eastern District of Pennsylvania discloses that fines totalling $1,200,000 have been paid by the Commonwealth.

questions of appellant jurisdiction and assuming such, of scope of review.

A

Appellees suggest that this appeal must be dismissed because it is from a non-final unappealable order, and rely on the recent en banc decision of this court in *Croker v. Boeing Co.*, 662 F.2d 980 (3d Cir. 1981). In *Croker v. Boeing Co.*, we held that "a judgment in a case such as this may not be considered final for purposes of appeal until a district court has determined the extent of liability for any attorney's fees to be awarded." *Id.* at 983. Because paragraphs 3 and 4 of the order appealed from leave open the question whether costs and counsel fees shall be awarded to the plaintiffs, and if so, the amount thereof, appellees argue that *Croker v. Boeing Co.* is dispositive.

Croker v. Boeing Co. is, however, distinguishable both on its facts and for the underlying policy reasons on which it is premised. That case presented the issue whether an appeal in an action involving money damages could be taken where the only issue unresolved was the amount of attorney's fees to be awarded. The holding of the court that it could not was based on two policy reasons: making certain the time when an appeal *must* be taken; and bringing before a single appellate panel all claims in a case at one time.

In this case, the primary issue has been the injunctive relief to which plaintiffs are entitled. Although we do not hold that an appeal from an order of civil contempt in an injunction action comes within the language of 28 U.S.C. §1292(a) permitting immediate appeal from orders granting or denying injunctive relief, an examination

of the history of this action shows why the *Croker v. Boeing Co.* holding in inapplicable. For example, the appeal from the 1978 order was heard by us, by the Supreme Court, and by us on remand from the Supreme Court, while applications for attorneys fees and costs remained, and still remain, undetermined in the District Court. It is quite likely in a situation such as presented here, where the contempt arose after the grant of a permanent injunction, that we will in the future be called upon to review whatever action is taken with respect to fees in the underlying action. Because Section 1292(a) permitted the earlier appeal it was never possible to achieve the policy of *Croker v. Boeing Co.* of bringing all claims in the case before a single appellate panel at one time.

Furthermore, civil contempt, like the injunctions and orders in the nature of injunctions which are appealable under section 1292(a), is coercive in an ongoing sense. If the order were to remain unreviewed while lengthy hearings went forward on fee applications, possible irreparable consequences to the parties might result. For example, a civil coercive contempt order committing a party to jail which represented the final issue on the merits could remain unreviewed while fee hearings went forward, or even worse, while no action was undertaken to bring the fee matter to a speedy resolution.

Finally, in a recent case we have explained that the holding in *Croker v. Boeing Co.* represents an interpretation of the single judicial unit rule embodied in Rule 54(b), and not an interpretation of finality governed by 28 U.S.C. §1291. See *de Mouy v. Ingvoldstad*, 664 F.2d 21, 22 (3d Cir. 1981). *See also Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1940) (civil contempt order reviewed as

a final judgment). Since Rule 54(b) is concerned with appeals before the disposition of fewer than all of the claims or parties, it is questionable whether it has any applicability here, where the contempt was entered after the grant of a permanent injunction and no other substantive relief is sought. For all of these reasons, we conclude that the rule announced in *Croker v. Boeing* does not require that the appeal be dismissed. We turn therefore to the scope of review.

B

Although the appellants have urged otherwise, it is plain that the order appealed from is a civil, not a criminal contempt judgment. For civil contempt orders the settled rule is that, when directed against parties, such orders are interlocutory and unreviewable except incident to an appeal from a judgment otherwise appealable. *E.g., McCrone v. United States*, 307 U.S. 61 (1939); *Fox v. Capital Co.*, 299 U.S. 105 (1936); *Doyle v. London Guarantee Co.*, 204 U.S. 599 (1907); *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1340 (3d Cir. 1976); *Firemen's Fund Insurance Co. v. Myers*, 439 F.2d 834, 837 (3d Cir. 1971). O'Bannon and the Commonwealth contend that because the contempt order here was entered in a post-permanent injunction proceeding, it is final and appealable because there is no other judgment for which an appeal may lie. However, those cases which recognize the reviewability of post-judgment civil contempts narrowly circumscribe the issues which may be considered. Only issues which could not otherwise be subject to appellate review by the ordinary processes of the Federal Rules have been considered. In *Penfield Co. v. SEC*, 330 U.S. 585 (1947), and *Lamb v. Cramer*, 285 U.S. 217

(1932), for example, the Supreme Court reviewed cases in which, on a party's motion for coercive civil contempt to enforce a final judgment, a lower court refused to enter an effective coercive order. *See also, Stringfellow v. Haines*, 309 F.2d 910 (2d Cir. 1962). In *Reed v. Cleveland Board of Education*, 607 F.2d 749 (6th Cir. 1979), the Court of Appeals considered contentions that one contempt order was entered without notice and a hearing, and that another was entered for violation of an order which did not give fair notice of prescribed conduct. In *Vincent v. Local 294, International Brotherhood of Teamsters*, 424 F.2d 124 (2d Cir. 1970), the Court of Appeals, although dismissing the appeal as moot, suggested that it had jurisdiction to consider the question whether the contemnor had in fact disobeyed the order. None of those cases suggest any erosion of the settled rule that the merits of the underlying order may not be called into question in a post-judgment civil contempt proceeding. *Oriel v. Russel*, 278 U.S. 358 (1929).

There are strong policy reasons for limiting review, even in post-final judgment contempt proceedings, to matters which do not invalidate the underlying order. If a civil contemnor could on appeal raise any substantive defense to the underlying order by disobeying it, the time limits specified in Fed. R. App. P. 4(a) would easily be set to naught. In cases such as this, where a timely appeal was taken from at least one of the underlying orders, recognizing the possibility of relitigation of the merits of that order presents the prospect of perpetual relitigation, and thus destroys the finality of judgments of both appellate and trial courts. These considerations militate strongly against the pronouncement of an interpretation of 28 U.S.C. §1291 which would permit review in a civil

contempt proceeding of any attack on validity which that party could raise or could have raised by an appeal reviewing the underlying order.

In this appeal O'Bannon and the Commonwealth concede that they have disobeyed the June 4 and July 14 orders. They concede that those orders gave them fair notice. They make no procedural objection to the contempt hearing. They concede, as well, that for purposes of this proceeding those orders are valid. By this last concession they apparently seek to set themselves outside the rule of *Oriel v. Russel, supra,* and outside the ambit of the policy reasons discussed in the preceding paragraph. Their contention is that the change in Pennsylvania law made on June 23, 1981, when the Governor signed the appropriation bill containing the legislature's mandate to disobey the injunction requiring that the Commonwealth fund the Masters' offices, is a circumstance which could not be brought to this court's attention by appeal from any order other than this civil contempt order. That contention is inaccurate. At the time the Secretary and the Department of Public Welfare made the deliberate and considered choice to advise the Court that it intended to disobey the June 4, 1981 payment order it was open to those defendants to move before the District Court under Rule 60(b)(5) or (6) for relief from paragraph 8 of the March 17, 1978 judgment on the ground that the action of the Pennsylvania legislature justified relieving the Commonwealth from the obligation there imposed. Had such a motion been made and denied, an appeal of right could have been carried here pursuant to 28 U.S.C. §1292(a)(1). Thus it cannot be said that this is a case in which no other route to appellate review except self-help was available to the contemnors. Moreover by resorting to self-help in a situ-

ation where a post-judgment change in the law is arguably a reason for relief from the judgment, a party subject to that judgment deprives the other side of the notice and opportunity to be heard which Rule 60(b) would otherwise require, and of the protection of the provision in that rule that "[a] motion under this subdivision (b) does not affect the finality of the judgment or suspend its operation." The rule contemplates consideration by the trial court of the competing equities, of the strengths and weaknesses of the parties' positions, and of the imposition of conditions for relief from a judgment. It contemplates that an appeal will come before us with a record reflecting those considerations. The self-help route leaves the trial court with no alternative except restoration of the status quo ante bellum by a coercive contempt order.

Had a Rule 60(b) motion been made, the District Court could have been informed of alternative means, if any, for the performance of those functions now being carried out by the Special Master and Hearing Masters, and would have been able to make an informed decision as to the advisability of modifying paragraph 8 of the March 17, 1978 judgment. Instead, as the colloquy before the legislature and O'Bannon's countermand of Assistant Secretary Howse's direction to the Comptroller to honor the June 4 payment orders amply demonstrate, the Commonwealth Department of Public Welfare deliberately chose to avoid an orderly presentation of the contention that the legislature's action warranted some alternative to paragraph 8, and to force an immediate confrontation. Even in responding to the order directing that they show cause why they should not be held in contempt neither O'Bannon nor the Commonwealth filed a paper with or made an argument to the district court which could by

appellate ingenuity be tortured into a request for consideration of a modification of paragraph 8. Instead, their position was that the action of the Pennsylvania legislature relieved them of the obligation to obey that paragraph. Since the question whether the action of the Pennsylvania legislature requires a modification of the underlying orders imposing on the Commonwealth the expenses of the Masters offices could have been raised in a Rule 60(b) motion, and we would have appellate jurisdiction over an order granting or denying Rule 60(b) relief, we hold that the effect on the underlying orders of the appropriations act may not be considered in an appeal from a civil contempt order. Any other holding would be an open invitation to any party subject to an injunction to resort to self-help whenever in its view some change in the law warranted relief from a judgment.

O'Bannon and the Commonwealth urge that even if the action of the Pennsylvania legislature could have been called to the trial court's attention by a Rule 60(b) motion, we should at least consider on this appeal their contention that the appropriations act made performance of the funding obligation "impossible." For this contention they rely upon *Maggio v. Zeitz*, 333 U.S. 56 (1948). For several reasons that case is not dispositive. In the first place, the Supreme Court's appellate jurisdiction in reviewing a decision of a federal court of appeals does not depend upon whether the order is final or interlocutory, but only upon whether the case was properly in the court of appeals. 28 U.S.C. §1254. *Maggio v. Zeitz* involved a contempt of a turnover order in a bankruptcy proceeding. The contempt proceeding was specifically authorized by the former Bankruptcy Act. 11 U.S.C. §11(a)(16) (repealed 1979). Appellate jurisdiction in the Second Cir-

cuit turned not on the predecessor to 28 U.S.C. §1291, but on the former 11 U.S.C. §47(a) (repealed 1979), which authorized review of orders "in proceedings in bankruptcy", whether interlocutory or final. *See In re Luma Camera Service, Inc.*, 157 F.2d 951 (2d Cir. 1946), *vacated, Maggio v. Zeitz*, 333 U.S. 56 (1948). (Review of contempt proceeding in the matter of Luma Camera Service, Inc., bankrupt; Maggio, contemnor). Thus a final order from the District Court was not a necessary predicate to appellate jurisdiction in *Maggio v. Zeitz.*[18] Moreover, the "impossibility" of which the Court speaks in that case is literal physical impossibility of compliance, and not, as here claimed, a subsequent change in the law allegedly making compliance illegal though physically possible.[19] Whether in cases of literal physical impossibility of compiance a party to a final judgment must raise that contention in a Rule 60(b) motion for relief from its terms in order to seek appellate review is a question of first impression.[20] We hold that a party may raise such a contention in defense to a civil contempt citation. We also hold that in the circumstances here, where the contemnor participated in effectuating the change in the law which is

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[18] *See also, In re Cantwell*, 639 F.2d 1050, 1052 (3d Cir. 1981); *In re W. F. Breuss, Inc.*, 586 F.2d 983, 985 (3d Cir. 1978); *In re Imperial "400" National, Inc.*, 391 F.2d 163, 167 (3d Cir. 1968).

[19] The Commonwealth's physical ability to pay can hardly be doubted. It has paid $1,200,000 in civil fines.

[20] That question is not decided by cases recognizing physical impossibility as a reason for withholding or terminating a contempt order. Shilletani v. United States, 384 U.S. 364, 371 (1966); United States v. Bryan, 339 U.S. 323, 330 (1949); United States v. Asay, 614 F.2d 655, 660 (9th Cir. 1980); United States v. Wendey, 575 F.2d 1025 (2d Cir. 1978). Those cases all involved

alleged to establish a legal impossibility, sound policy does not permit the by-pasing of the orderly route to appellate review provided by Rule 60(b).

Our insistence that relief from the judgment should first be presented to the District Court in an orderly manner should not be construed as an expression of hostility to the spirit of economy voiced by Secretary O'Bannon and the Pennsylvania Legislature. If, in fact, the Masters' operations are now, as O'Bannon told the Legislature, redundant, the District Court must take the redundancy into account in ruling on a Rule 60(b) motion to modify the injunction. When the Court acted on March 17, 1978 the Commonwealth defendants, the County defendants, the Pennhurst staff and some parents of inmates opposed any significant relief. In face of such intransigence few, if any, alternatives were available to the Court than to resort to the use of Court appointed monitors.[21] If the situation has changed significantly the defendants remain free even now to make a Rule 60(b) motion for relief from the judgment. If such a motion is made, we are confident that a less elaborate monitoring system will be carefully considered by the District Court.

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non-party witnesses and thus were reviewable by virtue of the *Alexander-Bessette* interpretation of §1291. *See* Alexander v. United States, 201 U.S. 117 (1906); Bessette v. W. B. Conkey Co., 194 U.S. 314 (1904); Fenton v. Walling, 139 F.2d 608 (9th Cir. 1943), *cert. denied*, 321 U.S. 798 (1944).

[21] In Rennie v. Klein, 653 F.2d 836, 849 (3d Cir. 1981) (en banc) this Court held that when state procedures facially complied with constitutional requirements and state officials were in good faith implementing them, additional procedures should not be ordered. In this case, in sharp contrast, in 1978 the defendants were firmly resisting any relief.

C

One remaining objection to the civil contempt order, not presented to the District Court and not briefed by the appellants, but adverted to at oral argument of the appeal, remains to be considered. Fed. R. Civ. P. 53(a), dealing with the use of masters, provides in part:

> The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties . . . as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, *the master is entitled to a writ of execution against the delinquent party.* (Emphasis supplied).

At oral argument the suggestion was made that the italicized language may mean that for recovery of expenses for the masters offices a writ of execution is a preferred remedy which should be resorted to before holding a state officer or the Commonwealth in contempt. Such an issue obviously would qualify as one which could not be raised either in an appeal from the underlying order or by a Rule 60(b) motion, and its consideration is not precluded by the analysis in Part III B above. There is, however, an insurmountable barrier to its consideration at this time. Ordinarily we do not consider as reasons for a reversal of an order matters which were not first presented to the District Court. *E.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1975); *Caisson Corp. v. Ingersoll-Rand Co.*, 622 F. 2d 672, 680 (3d Cir. 1980); *Teen-Ed Inc. v. Kimball International Inc.*, 620 F.2d 399, 401 (3d Cir. 1980); *Toyota Industrial Trucks USA, Inc. v. Citizen's National*

Bank of Evans City, 611 F.2d 465 (3d Cir. 1979). That rule is not a bar to our consideration of plain error. *E.g., Weaver v. Bowers*, 657 F.2d 1356, 1361 (3d Cir. 1981); *Switlik v. Hardwicke Co. Inc.*, 651 F.2d 852, 857 (3d Cir. 1981); *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981). The District Court's order cannot be so considered, however, for even if execution is a preferred remedy, an issue we need not decide, its choice or rejection would require the exercise of an informed discretion. No opportunity was ever presented to the trial court to exercise such discretion, since the Commonwealth defendants never urged a writ of execution as an alternative remedy.

IV

The contention that the change in Pennsylvania law is a reason for relieving the defendants of the obligation to fund the Masters' offices will not be accepted as a defense to civil contempt in this case. It must be presented to the District Court in a Rule 60(b) motion for relief from the judgment. No other defense to the contempt order was advanced in the District Court. The order appealed from will, therefore, be affirmed.

Aldisert, *Circuit Judge, Concurring.*

I join in the majority opinion, except for the small portion of Part I that relies on our prior adjudication in this case as if it were a binding precedent. I believe it is more accurate merely to state that a previous majority opinion of this court, 612 F.2d 84 (3d Cir. 1979) (in banc), supporting a judgment subsequently reversed by the

Supreme Court, 451 U.S. 1 (1981), rejected an attack on the district court's appointment of a special master. *See* 612 F.2d at 111-12. In the face of the Supreme Court's reversal, I am unwilling to accord any precedential vitality to that opinion.

Nevertheless, I join the majority because I am unwilling to assume a posture that would put this court out of touch with reality. It would serve no useful purpose to conduct an academic exercise that would further prolong these proceedings, in which counsel for all the litigants have shown more interest in seeking judicial endorsement of their idiosyncratic views of the law than in properly resolving a truly difficult dispute.

This is not an ordinary contempt proceeding. Rather, it is a vehicle chosen by the district judge to obtain Commonwealth financing for his employment of masters to implement his remedy. That financing has now been secured up to June 1982. To hold now that the appointment of the masters was invalid *ab initio* would serve no realistic function. The work has been performed, the funds have been expended, and there is simply no way to undo the work performed by the masters or to return the funds to the Commonwealth. Moreover, it would be counterproductive to readjust the status or classification of the Pennhurst residents who have been processed by the masters. It would have been preferable, however, for this court to have granted the motion for a stay so that the issue could have been resolved before the expenditure of massive funds in the form of civil contempt fines. I voted for a stay, but both the majority of this court and the Supreme Court ruled otherwise. It also would have been preferable to expedite these proceedings before a panel.

I voted against an initial hearing in banc because of the scheduling and other delays inherent in our in banc procedure, but again a majority of this court voted otherwise.

Accordingly, because I am disenchanted with the establishment of the masters' apparatus, I believe that we should remove these proceedings from the appellate level and return them to the district court as soon as possible. Appellants then may move for relief under Fed. R. Civ. P. 60(b), allowing the district court to act immedidately to have its remedy implemented by state officers under state law.

It is for these very pragmatic reasons that I join the majority. I do this to give Secretary O'Bannon the earliest possible opportunity to make a presentation on the basis of changed circumstances. Moreover, I would have our mandate issue forthwith so that the proceedings in the district court would not be further delayed.

Garth, *Circuit Judge*, concurring in part and dissenting in part, with whom Judge Hunter joins.

I agree with the majority that this court has jurisdiction over the contempt appeal at 81-2381. I reach this conclusion by a different route from the majority, however, for I believe that *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336, 1340 (3d Cir. 1976), and *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1179 (3d Cir. 1976), establish that this court has jurisdiction to decide the validity of the contempt order in conjunction with the appeals of the district court's orders of March 17, 1978, and July 14, 1981. As for the merits of the appeal in No. 81-2381, I would hold that because the underlying

orders appointing a Master at Pennsylvania's expense were improper, the contempt order must fall as well.

I.

Considered by itself, the district court's August 25, 1981, contempt order would not be appealable. It is not an "injunction" and thus there is no appellate jurisdiction under §1292. Nor is it a "final order" appealable under §1291. Under this court's decision in *Croker v. Boeing Co. (Vertol Div.)*, 662 F.2d 975 (3d Cir. 1981) (en banc), so long as attorney's fees remain undetermined, an order is not "final" for our jurisdiction to attach. In this case, the district court's order holding the Commonwealth defendants in contempt reserved decision on whether the plaintiffs should be awarded attorney's fees incurred in conjunction with the contempt proceedings. In my view, *Croker* is controlling here, and undermines any argument that this court has jurisdiction under §1291 to hear the appeal of the district court's order of August 25, 1981.

Nevertheless, I believe that the contempt appeal is properly before this court under *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336 (3d Cir. 1976), *United States v. Spectro Foods Corp.*, 544 F.2d 1175 (3d Cir. 1976), and many other similar cases. In those cases, a preliminary injunction had been issued, followed by an order holding one of the parties in contempt for violating the injunction. In such cases, where an appeal has been taken from the preliminary injunction, this court has repeatedly held that

> although an adjudication of civil contempt is not ordinarily appealable [until a "final decision" has been rendered], it is well established that an appellate court may consider the matter of a civil contempt in

> connection with an appeal from the underlying preliminary injunction.

Latrobe, supra, 545 F.2d at 1340 (footnote omitted). *Accord, Spectro Foods, supra,* 544 F.2d at 1179. The logic of these decisions appears to rest on the principle that, because civil contempt is remedial, not punitive, in nature,

> the reversal of the [preliminary injunction] decree . . . does more than destroy the future sanction of the decree. It adjudges that it never should have passed; that the right which it affected to create was not right at all. To let the liability stand for post contumacy would be to give the plaintiff a remedy not for a right but for a wrong, which the law should not do.

Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 F.2d 727, 727 (2d Cir. 1936). *See also United States v. United Mine Workers,* 330 U.S. 258, 295 (1947); *Bethlehem Mines Corp. v. United Mine Workers,* 476 F.2d 860, 864-67 (3d Cir. 1973).[1]

This "well-established" doctrine provides an entirely sufficient basis for jurisdiction over the present contempt appeal.[2] In this case the underlying injunctive orders—

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[1] To be sure, this court, sitting *en banc,* could overrule the panel decisions in *Latrobe* and similar cases. I can think of no reason for doing so, however, and I note that as recently as February 1, 1982, this court sitting *en banc* went out of its way to note the continuing vitality of *Latrobe* and *Spectro. See* Kershner v. Mazurkiewicz, No. 81-1042 (3d Cir. Feb. 1, 1982), slip op. at 18 n. 12.

[2] Both the majority and Chief Judge Seitz are therefore incorrect in focusing their respective analyses solely on the question of the appealability of the contempt order under §1291.

the court's permanent injunction of March 17, 1978, and the related payment orders of July 14, 1981, issued pursuant to that injunction—have been timely appealed. Thus, to paraphrase *Latrobe*, although the district court's contempt order of August 25, 1981, would not ordinarily be appealable, it is clear that this court may consider that contempt order in connection with the appeal from the underlying injunctive orders of March 17, 1978, and July 14, 1981.[3]

In my view, the majority's attempt to distinguish *Croker* needlessly clouds the law of "finality" under §1291, and raises the prospect of numerous arguments in the future that the "underlying policy" of *Croker* is inapposite in this or that particular set of circumstances. Even assuming for the sake of argument that it is desirable to begin carving exceptions into the rule so recently announced in *Croker*, I cannot understand the need to do so in this case, in which another, well-established basis for jurisdiction is presented.

Chief Judge Seitz, on the other hand, is correct in arguing, in his separate dissenting opinion in No. 81-2381, that this court has no jurisdiction over the contempt appeal under §1291; but he apparently overlooks another fount of jurisdiction which does support an appeal from the contempt order. In the cases cited in Judge Seitz's opinion, the contempt was not appealed in conjunction with an appeal of an *injunctive* order, as it was in *Latrobe* and *Spectro Foods*, and as it is here. Thus while relevant to appellate jurisdiction under §1291, the cases cited by Judge Seitz have no relevance to, and indeed in no way bring into question, this court's jurisdiction under §1292 over the appeal at No. 81-2381.

[3] Because, as is evident from the above discussion, I conclude that this court has jurisdiction in No. 81-2381 under the *Latrobe* doctrine. I do not find it necessary to address any other aspects of appealability, such as the nature of the issues that may be raised on §1291 appeals from post-judgment contempt orders. *Cf.* Maj. Op. in No. 81-2381, slip op. at [17]-[23].

II.

As I have indicated in my separate opinion in the appeals at Nos. 81-2448 and 81-2449, the district court's orders of July 14, 1981, requiring payment to the Special Master and the Hearing Master, were improper. And as the underlying orders upon which the contempt was predicated cannot stand, neither can the adjudication of contempt itself be upheld. In accordance with the views that I have expressed in this opinion, and in my separate opinions in the merits appeals (Nos. 78-1490, -1564, -1602) and the payment orders (Nos. 81-2448 and 81-2449), I would remand all the cases to the district court with two instructions. First and foremost, I would direct the district court to enter an order doing no more than enjoining the Commonwealth to comply with its own statutes, regulations and decisional laws affecting the care of the plaintiffs, thereby discontinuing the offices of the Special Master and the Hearing Master. Second, I would direct the district court to return to the Commonwealth any as-yet unspent moneys accumulated from the $10,000-a-day civil contempt fine, and, if requested by the Commonwealth, to resolve any questions concerning moneys already spent.[4]

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[4] A reversal in Nos. 81-2448 and 81-2449 on the ground that Pennsylvania should not have been ordered to pay for the expenses of the Master would entitle the Commonwealth, on remand, to seek reimbursement for the moneys already deducted from the accumulated civil contempt fine and applied to the Master's expenses. I recognize, however, that because Pennsylvania had a state-law duty to perform the same functions that the Master was performing, it would have had to expend its own funds as it carried out its state-law duties. It would be for the district court in the first instance to determine whether in so doing the Com-

Thus to the extent that the majority holds that appellate jurisdiction attaches to the contempt appeal at 81-2381 I am in agreement with that determination, even though the basis of my agreement is substantially different than the theory on which the majority proceeds. To the extent, however, that the majority has declined to discharge the contempt I must respectfully dissent for the reasons which I have specified.

Seitz, *Chief Judge*, dissenting.

I do not believe the contempt order of August 25, 1981 is appealable, and would dismiss the appeal for lack of appellate jurisdiction. I agree with the majority that the basis of our jurisdiction in the appeals from the district court's order of March 17, 1978 is 28 U.S.C. §1292(a)(1) (1976). Because plaintiffs' attorneys' fees incurred in securing the injunction have not been set, we do not have jurisdiction of those appeals under 28 U.S.C. §1291 (1976). *See Croker v. The Boeing Co. (Vertol Division)*, 662 F.2d 975, 983-84 (3d Cir. 1981) (in banc).

I believe that because the 1978 order is not a final decision under section 1291, we do not have jurisdiction to review the contempt order. It has long been settled that "except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of civil contempt." *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936). *See Fireman's Fund Insurance Co. v. Myers*,

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monwealth would have had to expend the same amount of money as it was required to pay in the payment orders, and if not, to make whatever adjustments as might be necessary.

439 F.2d 834, 838 (3d Cir. 1971). *See also Lamb v. Cramer,* 285 U.S. 217 (1932) (post-final judgment contempt order appealable). Because the contempt order in this case precedes final judgment, I disagree with the majority's conclusion that it is appealable under section 1291, and believe that appellate review of the contempt order must await final judgment in the principal action. As in any case where a civil contempt order is not immediately appealable, the result may cause hardship to the contemnors. Nonethless, I believe the appeal from the contempt order must be dismissed.

The Commonwealth defendants suggest that if we lack appellate jurisdiction to review the contempt order, then a writ of mandamus should issue. I do not believe the circumstances of this case justify this extraordinary remedy. *See Rodgers v. United States Steel Corp.,* 508 F.2d 152, 161 (3d Cir.), *cert. denied,* 420 U.S. 969 (1975).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2381

TERRI LEE HALDERMAN, a retarded citizen, by her mother and guardian, Winifred Halderman; LARRY TAYLOR, a retarded citizen, by his parents and guardians, Elmer and Doris Taylor; KENNY TAYLOR, a minor, a retarded citizen, by his parents and guardians, Elmer and Doris Toylor; ROBERT SOBETSKY, a minor, a retarded citizen, by his parents and guardians, Frank and Angela Sobetsky; THERESA SOBETSKY, a retarded citizen, by her parents and guardians, Frank and Angela Sobetsky; NANCY BETY BOWMAN, a retarded citizen, by her parents and guardians, Mr. and Mrs. Horace Bowman; LINDA TAUB, a retarded citizen, by her parents and guardians, Mr. and Mrs. Allen Taub; GEORGE SOROTOS, a minor, a retarded citizen, by his foster parents, William and Marion Caranfa, all of the above individually and on behalf of all others similarly situated; THE PARENTS AND FAMILY ASSOCIATION OF PENNHURST

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight; DAVID PREUSCH, a minor, by his parents and next friends, Calvin and Eliza-

beth Preusch, and CHARLES DiNOLFI, on behalf of themselves and all others similarly situated, Plaintiffs-Intervenors

UNITED STATES OF AMERICA, Plaintiff-Intervenor

vs.

PENNHURST STATE SCHOOL & HOSPITAL, DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, FRANK S. BEAL, Secretary of the Department of Public Welfare, Stanley Meyers, Deputy Secretary for Mental Retardation, Department of Public Welfare, HELENE WOHLGEMUTH, Former Secretary, Department of Public Welfare, ALDO COLAUTTI, Executive Deputy Secretary, Department of Public Welfare, WILBUR HOBBS, Deputy Secretary for Southeastern Region, Department of Public Welfare, RUSSELL RICE, JR., Commissioner of Mental Retardation for Southeastern Region, Department of Public Welfare, C. DUANE YOUNGBERG, Superintendent, Pennhurst State School & Hospital, ROBERT SMILOVITZ, Former Superintendent, Pennhurst State School & Hospital, MARGARET GREEN, BETTY UPHOLD, ALICE BARTON, P. E. KLICK, DR. PAROCCA, HELEN FRANCIS, employees and agents of Pennhurst State School & Hospital, JOHN DOCTOR, JAMES NURSE, JANE AIDE, JILL THERAPIST, RICHARD ROE, JANE DOE, unknown and unnamed staff, employees and agents of Pennhurst State School & Hospital, each individual Defendant sued individually and in his or her official capacity, GEORGE METZGER, JOSEPH CATANTA, and ROGER BOWERS, Commissioners for Bucks County, ROBERT STREBL, EARL BAKER, and LEO McDERMOTT, Commissioners

for Chester County, FAITH R. WHITTLESEY, CHARLES KEELER, and WILLIAM SPINGLER, Commissioners for Delaware County, A. RUSSELL PARKHOUSE, FRANK W. JENKINS and LAWRENCE H. CURRY, Commissioners for Montgomery County, MAYOR FRANK L. RIZZO and THE CITY COUNCIL OF PHILADELPHIA, as Authorities for Philadelphia County, PETER BODENHEIMBER, Mental Health/Mental Retardation Administration for Bucks County, WILLIAM A. McKENDRY, Mental Health/Mental Retardation Administrator for Chester County, P. PAUL BURRICHTER, Mental Health/Mental Retardation Administrator for Delaware County, HERMANN A. ROETHER, Mental Health/Mental Retardation Administrator for Montgomery County, and LEON SOFTER, Mental Health/Mental Retradation Administrator for Philadelphia County

Helen O'Bannon and the Department of Public Welfare,

Appellants In No. 81-2381

(D. C. Civil No. 74-1345)

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

Present: Seitz, *Chief Judge;* Aldisert, Gibbons, Hunter, Weis, Garth, Higginbotham and Sloviter, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel before the Court en banc on November 23, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 26, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

(s) Sally Mrvos
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 81-2381

TERRI LEE HALDERMAN, etc., et al.

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, ET AL.,
Plaintiffs-Intervenors

UNITED STATES OF AMERICA,
Plaintiff-Intervenor

v.

PENNHURST STATE SCHOOL & HOSPITAL, etc., et al.

Helen O'Bannon and the Department of Public Welfare,
Appellants in no. 81-2381

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge*, Aldisert, Gibbons, Hunter, Weis, Garth, Higginbotham and Sloviter, *Circuit Judges*

Gibbons, *Circuit Judge*.

The Commonwealth Defendants have filed a petition for rehearing from our en banc decision filed on February 26, 1982. They make two contentions worthy of comment.

First, Paragraph 7 of the petition states that the District Court never ruled on motions filed by each of the defendants to amend or alter the District Court's Order of March 2, 1981, and that they therefore "justifiably believed that filing a Rule 60(b) motion in relation to this matter would be a futile act." This statement is significantly misleading.

There was no connection between the provisions in the March 2, 1981 Order of the District Court, to which a motion to amend or alter was addressed, and the June 4, 1981 and July 14, 1981 payment orders which were the orders that the Commonwealth disobeyed.

The March 2 Order provided for additional services to class members. The motion to amend or alter that order, filed on March 11, 1981, basically quarrels with the District Court's schedule for provision of those services, and with the meaning of the Supreme Court's partial stay of the previous order of this court. The motion to amend or alter the March 2 order challenges neither establishment of the Masters offices, nor the Commonwealth's obligation to fund them.

On August 25, 1981 the Commonwealth defendants were held in contempt for disobeying two orders directing payment of costs for the Masters. In their appeal from the judgment of contempt, the Commonwealth's defense was impossibility of performance based on a change in Pennsylvania law. This argument was not presented in the March 11 motion to alter or amend the judgment. Indeed it could not have been since the Pennsylvania legislature only passed the statute disallowing further funding of the Masters in June of 1981. The March 11 motion thus does not undermine the conclusion in the opinion of

the court that the Commonwealth defendants never appealed or moved to reconsider Paragraph 8 of the District Court's March 17, 1978 judgment, but instead simply resorted to self-help. For the reasons set forth in the opinion of the court, a Rule 60(b) motion was necessary.

Second, the petition for rehearing argues that the Supreme Court's recent opinion in *White v. New Hampshire Department of Employment Security*, 50 U.S.L.W. 4255 (March 2, 1982), undercuts this court's recent holding in *Croker v. Boeing Co.*, 662 F.2d 975 (3d Cir. 1981) (en banc), that where a decision on attorney's fees is outstanding, there is not a final order which can be reviewed by the Court of Appeals. Appellants are correct that the holding of *White v. New Hampshire Department of Employment Security* that a request for attorney's fees raises legal issues collateral to the main cause of action overrules the portion of our opinion in *Croker* dealing with appealability when application for attorney's fees are not fully determined. Since the *Croker* rule no longer has any vitality, litigants in this circuit should rely on our previous holdings in *DeLong Corp. v. Raymond Intern., Inc.*, 622 F.2d 1135, 1138-39 n. 3 (3d Cir. 1980), and *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n. 2 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976), that orders disposing finally of the merits are appealable even though the questions relating to attorneys fees have been left undetermined.

The demise of the *Croker* rule on appealability does not, however, affect our holding in *Halderman v. Pennhurst* that the judgment of civil contempt was an appealable order. The opinion of the court distinguished *Croker*, we now know unnecessarily. Although the appealability

holding in *Croker* has been overruled, *White* does not provide the petitioners with any support for their petition for rehearing.[1]

The petition for rehearing will be denied.

By the Court
John J. Gibbons
Judge

Dated: March 23, 1982

Garth, *Circuit Judge*, concurring, with whom Judge Hunter joins.

Judge Gibbons, writing for the court, has denied the Commonwealth's Petition for Rehearing. I agree that the Petition should be denied, even though I maintain my disagreement with the Rule 60(b) argument found in the majority opinion. I therefore continue to hold to the view that because the payment orders and the order appointing a Master were improper, the contempt must fall as well. Nevertheless, I am in accord with the conclusion that the Commonwealth's assertions regarding its motion to alter or amend the district court's order of March 2, 1981, raise no issue requiring further consideration by this court.

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[1] Chief Judge Seitz agrees that *White v. New Hampshire Department of Employment Security*, 50 U.S.L.W. 4255 (U.S. March 2, 1982) overrules *Croker v. Boeing Co. (Vertol Division)*, 662 F.2d 975 (3d Cir. 1981) (en banc), insofar as *Croker* held that there is no appealable "final decision" for purposes of 28 U.S.C. §1291 (1976) until attorneys' fees have been set. *See* 50 U.S.L.W. at 4257 & n. 14.

I also agree that this court's decision in *Croker v. Boeing Co.*, 662 F.2d 975, 981-84 (3d Cir. 1981) (en banc), is inconsistent with the Supreme Court's recent decision in *White v. New Hampshire Department of Employment Security*, 50 U.S.L.W. 4255 (No. 80-5887 March 2, 1982), and that therefore this Circuit's *Croker* rule of appealability no longer has any vitality. I am concerned of course that this change in the time when an order becomes appealable may have unforeseen and dire effects on cases which are in our pipeline. It may also have a severe impact on parties who, in reliance on *Croker*, have taken no appeal from orders that are still awaiting determination of attorney's fees, only to find now that under *White* the order should have been appealed at the time of judgment and that the time for appeal has thus already passed. Yet, having once confronted this issue and having concluded at that time that prudential as well as jurisprudential considerations were best served by the *Croker* rule, there is little more to be said now that *Croker* has been effectively rejected by the Supreme Court's opinion in *White*.

While this change in the law of finality does not, of course, affect my earlier conclusion that the contempt order in this case was appealable, it does obviate the need to rely solely on *Latrobe Steel Co. v. United Steelworkers*, 545 F.2d 1336 (3d Cir. 1976), and *United States v. Spectro Foods Corp.*, 544 F.2d 1175 (3d Cir. 1976) in support of jurisdiction under 28 U.S.C. §1292. Accordingly, to the extent that I previously argued that jurisdiction over the contempt appeal could not be predicated on 28 U.S.C. §1291, *White* has now persuaded me otherwise.

In all other respects, however, while I join in denying the Commonwealth's Petition, I continue to adhere to my previously announced position, as it is expressed in the separate opinion which I filed urging that the contempt order should be overturned.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2381

TERRI LEE HALDERMAN, etc., et al.

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, ET AL.

Plantiffs-Intervenors

UNITED STATES OF AMERICA,

Plaintiff-Intervenor

vs.

PENNHURST STATE SCHOOL & HOSPITAL, etc., et al.

Helen O'Bannon and the Department of Public Welfare,

Appellants

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge* and Aldisert, Gibbons, Hunter Weis, Garth, Higginbotham and Sloviter, *Circuit Judges*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

Attest:
(s) Sally Mrvos
Clerk

Dated: March 23, 1982